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# CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT AND PORNOGRAPHY VICTIMS PROTECTION ACT OF 1987

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

## S. 703

THE PORNOGRAPHY VICTIMS PROTECTION ACT OF 1987

AND

## S. 2033

TO AMEND TITLE 18, U.S. CODE, WITH RESPECT TO CHILD PROTECTION AND OBSCENITY ENFORCEMENT, AND FOR OTHER PURPOSES

JUNE 8, 1988

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# S. 2033, CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT, AND S. 703, PORNOGRAPHY VICTIMS PROTECTION ACT OF 1987

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WEDNESDAY, JUNE 8, 1988

U.S. Senate,
Committee on the Judiciary,
*Washington, DC.*

The committee met, pursuant to notice, at 10:11 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Dennis DeConcini (acting chairman) presiding.

Also present: Senators Thurmond, Grassley and Humphrey.

## OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeConcini. Welcome, everyone. The Senate Judiciary Committee hearing on S. 2033, the Child Protection and Obscenity Enforcement Act, and S. 703, the Pornography Victims Protection Act, will commence.

Pornography is a big business in the United States and probably throughout the world. It is a very big business. The Justice Department has estimated that pornographic sales total nearly $4 billion annually. That is said to be very conservative. A major part of the pornography network is child pornography and its trappings. Child pornography has become a highly organized, multimillion-dollar industry preying on the youth of our country who are either unable to protect themselves or are induced into participating by those who they trust.

The sexual exploitation of any human being, especially those who are young, impressionable, and vulnerable, is reprehensible. It is an affront to every individual and to every community that strives to maintain a decent society and to protect its citizens and their fundamental rights. If we are to deal effectively with the problem of obscenity, it is essential that we recognize that its victims are members of society, regardless of the sex, age, race, religion or social status.

Perhaps the most degrading, revolting aspect of the increased smut trade that is engulfing decency is child pornography. It is beyond the comprehension of this Senator that men and women would sexually exploit young children. Many of the victims are runaways who have fallen into criminal hands, but studies indicate that a vast number of children under the age of 8 are provided to the pornographers by parents or guardians or people who have custody.

Participation in the production of obscene material is not the only form of harm which can come to a child. In today's world, kids may be bombarded daily by obscene publications at the local drug store or by transmittal of obscenity over cable television networks or by obscene material distributed through the mails and found in the nearby movie theaters.

The value of a moral society has taken a back seat to the money hungry, illegal, immoral sex industry. S. 2033, the Child Protection and Obscenity Enforcement Act, addressed three key areas of concern: one, the sexual exploitation of children through child pornography; two, obscenity provisions; and three, child protection amendments concerning dial-a-porn and cable pornography.

S. 703, the Pornography Victims Act, is an attempt to eradicate the exploitation associated with pornography. This bill would recognize the legal right of children and adults who have been induced wrongfully to participate in sexual activities for the production of pornography. S. 703 makes it an offense to coerce, intimidate or fraudulently induce any adult to engage in sexually explicit conduct for visual description.

Remedies under the bill include injunctive relief action for treble damages by the victim and a civil penalty of $100,000 and forfeiture of any property used in connection with the offense. Due to time restraints that we have this morning with the large number of witnesses, I am going to, without objection, have my full my statement put in the record.

It is time that we no longer just give lip service to being opposed to pornography, and particularly child pornography. It is important for society to face up to the challange and set some standards, and I hope that this morning will be the beginning of that.

I know that other Senators have over the years attempted to move in this direction, only to see their efforts fail. And this Senator intends to keep persisting.

[The prepared statement of Senator DeConcini follows:]

**NEWS**

From U.S. Senator
Arizona

**DENNIS DeCONCINI**

Hart Senate Office Building, Washington, D.C. 20510

Contact: Bob Maynes
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For immediate release:
June 8, 1988

WASHINGTON -- Following is the statement given by Senator Dennis DeConcini (D-Ariz.) at the Senate Judiciary Committee hearing on S. 2033, the Child Protection & Obscenity Enforcement Act, and S. 703, the Pornography Victims Protection Act of 1987, on Wednesday, June 8 at 10:00 a.m.

Pornography in America is a big business. A very big business. The Justice Department has estimated that pornography sales total nearly $4 billion annually! --- and that is said to be a conservative estimate. A major part of the pornography network is child pornography and its trappings. Child pornography has become a highly organized, multimillion-dollar industry preying on the youth of our country who are either unable to protect themselves or are induced into participating by those they trust.

-MORE-

Senator DeConcini
June 8, 1988
Add 2

S. 2033, the Child Protection and Obscenity Enforcement Act addresses three key areas of concern: (1)sexual exploitation of children through child pornography; (2)obscenity provisions; and (3)child protection amendments concerning dial-a-porn and cable porn.

In the area of exploitation, the bill as it is now crafted would prohibit the use of computers to advertise, distribute, or receive child pornography and related information. Additionally, this bill would prohibit a parent, legal guardian or one having custody or control of a minor from selling or transferring control of that minor when the person knows the minor would be used for production of pornographic materials. The bill would also require producers and certain distributors of these types of materials to create and maintain verifiable records with respect to age and identity of each performer appearing. If this record keeping requirement is not met, the burden of proving the performer was not a minor would be on the producer or distributor in any subsequent prosecution. Finally, in the area of exploitation, this bill would make a child pornography violation a predicate offense under the Racketeer Influenced and Corrupt Organizations (RICO) statute. This would allow, among other things, for the seizure and forfeiture of profits derived from the offense.

The obscenity provisions of this bill would establish the receipt or possession of obscene material, with the intent to sell or distribute, a criminal offense. Also the mere use of a facility or means of interstate commerce to transport obscene materials would be prohibited. This would reduce the burden of proof placed upon the prosecutor from proving the defendant actually transported across state lines to only having to prove the defendant used a facility or means of interstate commerce. Furthermore, this bill would permit criminal and civil asset forfeiture, similar to the asset forfeiture statutes which have been successful in the drug enforcement and racketeering areas.

The bill would also make it a criminal offense to possess or sell obscene visual depictions or child pornography on Federal property. Additionally, the government would be authorized to seek court ordered wiretaps for felony obscenity offenses.

-MORE-

Senator DeConcini
June 8, 1988
Add 3

The remaining concerns addressed by this bill include the cable porn and dial-a-porn industries. As the bill is now drafted, the utterance of obscene language or the distribution of obscene material by cable television or other subscription television services would be a criminal offense. Secondly, the bill would prohibit the making of obscene telephone calls, for commercial purposes, to any person, regardless of age, regardless of whether the maker of the communication placed the call, and regardless of whether the communication was made directly or by recording the communication and replaying it over the phone. In light of the recent passage of the Education Bill containing similar language, this section may need further attention and revision.

S. 703, the Pornography Victims Protection Act, is an attempt to eradicate the exploitation associated with pornography. This bill would recognize the legal rights of children and adults who have been induced wrongfully to participate in sexual activity for the production of pornography. S. 703 makes it an offense to coerce, intimidate, or fraudulently induce any adult to engage in sexually explicit conduct for visual depiction, knowing that the product or person will go through interstate commerce. It also is an offense to produce pornography with the knowledge that it involves an adult who has been wrongfully induced to perform. Finally, it is an offense to produce pornography with the knowledge that it involves a minor who was transported in interstate commerce.

Remedies under the bill include injunctive relief, action for treble damages by the victims, and a civil penalty of $100,000 and forfeiture of any property used in connection with the offense.

Society is dependent on the actions taken by this Congress. In the recent history of our Nation the social problem of sexual exploitation has run rampant. The sordid element of society has capitalized on the perversions of the weak, and abused the rights of many. Most disturbing of all, the vermin that prey on those who can not protect themselves have continually exploited the children of our society. The unknowing and unaware have become victims of the unscrupulous and demented.

In recent years legislation has been passed, task forces organized, and commissions appointed to address the problem of obscenity and child pornography. I believe the legislation we are discussing today is a needed weapon in the continuing fight against child pornography and obscenity, and I urge the Committee to give this its fullest attention.

-30-

Senator DECONCINI. At this time, I would like to yield to the distinguished ranking member of the Judiciary Committee, the former chairman. The Senator from South Carolina is recognized.

## OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Chairman, I am pleased to be here today at the Judiciary Committee hearing on S. 2033, the Child Protection and Obscenity Enforcement Act of 1988, and S. 703, the Pornography Victims Act. Both of these bills are in response to the extreme harm that pornography causes to society as a whole, as well as to individuals who are adversely affected by its production and promotion.

Mr. Chairman, with regard to S. 2033, I introduced that bill along with my good friend from Arizona, Senator DeConcini, on February 4, 1988. Currently, 37 of our colleagues have joined on as cosponsors. Seven of the members of this committee are cosponsors. I introduced this legislation because of my deep concern with the spread of pornography in our Nation today. It disturbs me that adults choose to make pornography a part of their lives. However, of even greater concern is the effect that such material has on the children who are exposed to it or who are forced to participate in the production of sexually explicit material. The necessary steps must be taken to ensure that this senseless exploitation of children is not allowed to continue.

S. 2033 amends existing child pornography and obscenity laws to take into account new technologies that are being used in the distribution of pornography and also closes loopholes in current law to aid Federal prosecutors in the prosecution of persons who traffic in pornography.

Briefly, I would like to highlight the major provisions of this bill. This legislation will: First, prohibit the buying and selling of children for use in child pornography; second, require producers of sexually explicit material to document the ages of persons appearing in the material; third, add forfeiture provisions to the obscenity and child pornography laws; fourth, make it illegal to sell or possess obscene material or child pornography on Federal lands; and, fifth, make it illegal to provide obscene programming on cable and subscription services.

Additionally, this bill contains a provision with regard to dial-a-porn. In light of the recent enactment of a similar provision proposed by Senator Helms, the committee may need to consider further whether this provision is still necessary.

In summary, this measure is a comprehensive effort that builds on existing law in order to stop the flow of pornography in this country. It should be made clear from the outset that this bill does not establish new definitions for obscenity and child pornography. What it does do is ensure the effective enforcement of current laws in accordance with decisions rendered by the Supreme Court with regard to obscenity and child pornography. While I personally feel that all pornographic material should be banned, this bill does not limit the dissemination of material that is constitutionally protected.

Today, we will also consider S. 703, introduced by Senator Specter. This bill provides a civil remedy to victims of pornography. This is an innovative approach to redress the harm caused by pornography. It allows recovery of civil damages by those who are forced to participate in the production of such material. I look forward to hearing this testimony presented today on the approach suggested by this bill.

In closing, Mr. Chairman, let me reiterate that I am pleased that the Judiciary Committee is holding this hearing today on this important matter. I intend to work with Senator DeConcini and the other members of this committee to get this bill passed and urge that the Judiciary Committee consider S. 2033 as soon as possible. I am confident that the Judiciary Committee will move in an expeditious manner on this vital legislation so that the full Senate and the House have sufficient time to act before adjournment of the 100th Congress.

Now, Mr. Chairman, I have been called away to another hearing. In any event, I will certainly read this testimony. I want to take this opportunity to commend all the witnesses who are here today. I see Senator McConnell out there, and we are delighted to have him with us. He is the very able Senator from Kentucky. All the witnesses who come here and who believe in a wholesome, clean life for these young people, and who believe in decency in living, I congratulate you for coming and showing your interest in this hearing.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Thurmond.

I want the record to show that there will be a statement submitted by the Senator from Pennsylvania, Senator Specter. He has been hospitalized. He is doing all right. I just called Bethesda Naval Hospital where he is recovering from surgery, and he will not be able to be at the hearing this morning.

[The prepared statement of Senator Specter follows:]

# STATEMENT OF SENATOR ARLEN SPECTER
## COMMITTEE ON THE JUDICIARY
## JUNE 8, 1988

I thank Senator DeConcini for convening this hearing of the Judiciary Committee to consider legislation which addresses the important issues of child pornography, obscenity and sexual exploitation. I welcome all the distinguished witnesses present today, including Ms. Carol Lavery, Executive Director of the Victims Resource Center in Wilkes-Barre, Pennsylvania, who will testify on S. 703, the "Pornography Victims Protection Act." I also appreciate the opportunity to submit a prepared statement, and regret that I am unable to attend this hearing. I look forward, however, to reviewing the testimony presented today.

Mr. Chairman, the problem of child pornography and sexual exploitation of adults and children is one of growing magnitude in this country. Today's hearing will consider two bills which effectively seek to deal with these issues --- S. 2033, the "Child Obscenity and Enforcement Act," legislation introduced by my distinguished colleagues, Senator DeConcini and Senator Thurmond, and S. 703, the "Pornography Victims Protection Act", which I introduced on March 10, 1987.

The Pornography Victims Protection Act is the successor of S. 1187 -- legislation I introduced in the 99th Congress. This bill would allow victims of child pornography and adults who are coerced, intimidated or fraudulently induced into posing or performing in pornography to institute federal civil actions against producers and distributors. If plaintiffs prevail, such child or adult victims would recover treble damages and their costs of suit. In addition, victims could seek injunctions to prevent further production and distribution of the pornography. This bill also would authorize the Attorney General to seek $100,000 in civil penalties from any person violating Federal child or adult pornography statutes.

As former Chairman of the Judiciary Subcommittee on Juvenile Justice, I conducted a series of hearings to explore new approaches to combating pornography. The Pornography Victims Protection Act is based on extensive testimony from those hearings which provided substantial evidence that many individuals are forced to perform sexual acts suggested by pornographic materials and suffer serious harm as a result.

People are coerced into performing in pornography largely because a huge national market exists for such materials. Consumers have spent hundreds of millions of dollars to see these magazines, films and video tapes. Given the enormous profit potential of such productions, elimination of this type of coercion will require Government action.

The Pornography Victims Protection Act has broad congressional and constituent support. Fourteen Senators have cosponsored S. 703 and 110 House members have cosponsored H.R. 1213, the House companion bill introduced by Congressman Bill Green. The Pornography Victims Protection Act has been endorsed by many national and local organizations. The New York based Feminists Fighting Pornography also has provided petitions with thousands of signatures in support of S. 703 to members of Congress.

I believe that S. 703 represents a novel approach to combating the national problem of child pornography and sexual exploitation by providing actual victims the opportunity to seek compensation for their injuries. I also believe that S. 2033 is a comprehensive approach to strengthen existing law regarding child pornography and obscenity.

In closing, I urge the Committee to act expeditiously on these bills.

Senator DECONCINI. Senator McConnell, we welcome you to the Judiciary Committee. We know for many years you have promoted legislation along this line in some of your own dealing with this horrendous problem. If you care to make a statement, we are pleased to have you here today with your suggestions and advice regarding this legislation.

## STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator McCONNELL. Thank you, Senator DeConcini. I also want to thank Senator Thurmond for his kind remarks.

I think it is safe to say that prior to my coming to the Senate, in my 7 years as county executive of Jefferson County, Kentucky—which is Louisville—there was no issue upon which I spent more time. Back in 1979 we created a local Government and Exploited and Missing Child Unit, which was an inter-agency unit consisting of both social workers and police officers put together in one unit, headed by a social worker, to deal with these kinds of offenses against children. That particular unit became a model for the country.

Subsequent to that time, I chaired an organization called the Kentucky Task Force on Exploited and Missing Children which, after extensive hearings over a year's period of time, recommended a piece of legislation to the Kentucky General Assembly which passed in 1984 without a dissenting vote, again putting Kentucky in the forefront of this particular issue. It is safe to say Kentucky is not generally thought of as first in very many things, but in this particular field we have had a very progressive record in our State, of which I am proud and a lot of others are proud.

It seems to me, Mr. Chairman, that you and Senator Thurmond have adequately covered the measures upon which the hearing is being held today, and I would like to take my few moments here, in addition to asking that my full statement be inserted in the record——

Senator DECONCINI. Without objection, it will appear in the record.

Senator McCONNELL [continuing]. To call to the attention of you, Senator DeConcini, a measure that I introduced called the Child Search Assistance Act, S. 726, which would provide matching grants to State law enforcement agencies for information clearinghouses on missing and exploited children.

Just a quick bit of history, this bill passed the Senate in 1986. I introduced it back when I was still a member of the Judiciary Committee. It had over a hundred cosponsors in the House. It would link up the investigative resources of participating States since most missing child cases have interstate connections. The bill would also provide a basis for cooperation among State and Federal agencies. Finally, it would link local police, the initial contact point for child kidnapping and exploitation reports, to a sophisticated national network which we now have.

Perhaps the best part about this bill is that it does not require an extra dime from Congress since it would simply earmark funds from a discretionary grant program administered by the Office of

Juvenile Justice and Delinquency Prevention. OJJDP supports the earmarking of its discretionary funds for these clearinghouses and has previously made grants to States for this purpose.

Therefore, Senator DeConcini, I would just strongly urge this morning that the committee take a look at that bill, which has already cleared the Senate, which had a number of cosponsors in the House, and consider incorporating it into any legislation that the Judiciary Committee would report out on the subject of child protection.

To conclude, I would like to thank the committee for moving ahead on this critical issue. Over the past few years, we have heard eloquent, extensive testimony about the plight of children and the pervasiveness of child victimization in our society. I recently served on the President's Child Safety Partnership. We had a chance to hear a good deal about this problem. I also appeared before the Attorney General's Commission on Pornography.

So we have heard plenty of the stories, and it is time to get down to work on the issue. I want to particularly thank you, Senator DeConcini, for your leadership on this issue. I hope, as I indicated, that you will consider incorporating the measure that I have advocated earlier, which appears not to be controversial, into the measure that you report. And I wish you well as you hear from a variety of different people from across the country today who have been involved in this network on behalf of America's children for many years.

We have an outstanding group of citizens from all across this country who have come together over the last 6 or 8 years on this most important issue. They have gotten to know each other; they have shared ideas; they have shared techniques and approaches to dealing with this problem. And I think it is one of the areas where we can say we have made some real progress. A lot of problems in our society seem totally insoluble; and while I would not predict that we will completely eradicate this kind of criminal activity, we have made some progress. And with the kinds of measures that you have before you today, we will make another important step in that direction.

I want to thank you for your leadership and for holding these hearings.

Senator DECONCINI. Thank you, Senator McConnell. S. 226, your statement goes into the background of that legislation; is that right?

Senator MCCONNELL. Yes.

Senator DECONCINI. Was that passed in the 99th Congress or the 98th?

Senator MCCONNELL. It is currently S. 726, Mr. Chairman.

Senator DECONCINI. Excuse me. S. 726.

Senator MCCONNELL. It passed in the previous Congress, had a hundred cosponsors in the House, and just somehow did not make it through the process.

Senator DECONCINI. And it passed unanimously in the Senate by voice vote?

Senator MCCONNELL. Yes.

Senator DECONCINI. We are very interested in it. I do recall when you were on the Senate Judiciary Committee, and I recall that bill. Quite frankly, it slipped my mind. We will take a look at that.

Senator McConnell. I would appreciate it. It seems to me to entirely fit with what you are trying to do.

Senator DeConcini. It is a very good idea. And as you mentioned in your testimony this morning, it does not require additional funding. It can be handled out of existing funds, and that is something that we all have to look at. I promise you that we will take a close look at that legislation.

Senator McConnell. Thank you very much.

Senator DeConcini. We thank you for being here. I have no questions. Does the Senator from New Hampshire have any questions of our colleagues?

Senator Humphrey. No.

Senator McConnell. Thank you.

Senator DeConcini. Thank you very much.

[The prepared statement of Senator McConnell follows:]

# STATEMENT

## BY SENATOR MITCH McCONNELL
## BEFORE THE
## SENATE JUDICIARY COMMITTEE
## HEARING ON
## S. 2033: CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT

WEDNESDAY JUNE 8, 1988

---

Good morning. Let me first thank my friend and colleague from Arizona, Senator DeConcini, for inviting me to participate in today's hearing on S. 2033, the President's Child Protection and Obscenity Enforcement Act, of which I am an original cosponsor.

This legislation, unlike many other bills which come before the Senate, transcends the regional and partisan differences that often divide this body. The broad, bipartisan support for this measure is due to the fact that it protects a common interest, a truly national resource: our children. Child exploitation and abuse do not discriminate along social, economic, or geographic lines. We see glimpses of this tragedy in every state and nearly every community. And although it is not the dark secret it once was, child abuse and exploitation still are poorly understood and inadequately dealt with.

In my State of Kentucky, we are still looking for Ann Gotlib, the young daughter of immigrants to this country who just disappeared one day at a local shopping mall. Her story is all too familiar.

The positive side of this tragedy is that government can make a difference if it makes a commitment to protect children. When I was Judge-Executive of Jefferson County, we achieved better child protection through tougher laws, rigorous enforcement, and new social services. We created a special unit called the Kentucky Taskforce on Exploited and Missing Children to fight this threat. It became a model for the nation--a model of commitment at every level of government and every sector of the community.

I am very pleased to be a part of that continuing crusade on the national level. We are pursuing, and need to continue to pursue, a four-point plan to stop child abuse and exploitation:

(1) deterrence, through tougher penalties for child abuse;

(2) prevention, with better child abuse education;

(3) treatment, with leadership by the government in research and new treatment techniques; and

(4) total eradication of the child pornography industry.

Congress has made tremendous strides in child protection over the last several years, reauthorizing the landmark Child Abuse and Prevention Treatment Act of 1974, enacting the Anti-Drug Abuse Act of 1986, and fully funding programs for missing children and juvenile justice.

We still have far to go on on all four points I mentioned, but the bill before this committee today, the Child Protection and Obscenity Enforcement Act, is a promising step forward. Another bill to be discussed today, the Pornography Victims Protection Act, was introduced by Senator Specter and I last year. It is another important measure in the fight against child abuse, and I urge the committee to give it full consideration and support.

Finally, I would like to call the committee's attention to a bill I introduced, the Child Search Assistance Act, or S. 726, which would provide matching grants to state law enforcement agencies, for information clearinghouses on missing and exploited children.

This bill passed the Senate in 1986 and had over 100 cosponsors in the House. It would link up the investigative resources of participating states, since most missing child cases have interstate connections. The bill also would provide a basis for cooperation among state and federal agencies. Finally, it would link local police--the initial contact point for child kidnaping and exploitation reports--to a sophisticated national network.

Perhaps the best part about this bill is that it does not require an extra dime from Congress, since it would simply earmark funds from a discretionary grant program administered by the Office of Juvenile Justice and Delinquency Prevention. OJJDP supports the earmarking of its discretionary funds for these clearinghouses, and has previously made grants to states for this purpose.

Therefore, I strongly urge the committee to study this bill and consider incorporating it into any legislation reported by the committee on the issue of child protection.

To conclude, I would like to thank the committee for moving ahead on this critical issue. Over the past few years, we have heard eloquent, extensive testimony about the plight of children and the pervasiveness of child victimization in our society. I know when I participated in the President's Child Safety Partnership and the Attorney General's Commission on Pornography, I often was shocked by the statistics and stories we found.

But as I said at the beginning, government can make a difference if it makes a solid, sustained effort. The Attorney General's Commission and the President's Child Safety Partnership have completed their research, released their reports, and made their recommendations. It is now up to us to translate their work into action for the benefit of all of our children.

Again, I appreciate the opportunity to testify today, and commend the chairman for his dedicated work on child protection. As the Senate moves ahead on issues affecting our Nation's future, we must keep in mind that children are the key to that future, and their protection and care must be our foremost concern.

Thank you.

Senator **DeConcini**. The Senator from New Hampshire is recognized for an opening statement.

## OPENING STATEMENT OF SENATOR GORDON J. HUMPHREY

Senator **Humphrey**. Thank you, Mr. Chairman.

The findings of the Attorney General's Commission on Pornography demonstrates that the purveyors and publishers of such pornography continue to exploit and degrade children and women in our society. These profiteers not only destroy the lives of youthful "models" manipulated in their obscene pictures and productions, they spread a distorted image of sex which poisons millions of impressionable young minds.

I am pleased to be a cosponsor of S. 2033 because this legislation puts real "teeth" in our Federal anti-pornography legislation, with an appropriate focus on the shameful exploitation of children by the porn profiteers. In particular, I support the bill's new requirement that pornographers must keep records reflecting the identity and age of performers and models. This measure will help to prevent pornographers from evading the Federal ban on exploitation of minors by professing ignorance as to the age or identity of those whom they exploit.

Mr. Chairman, I will just ask that I may put the balance of my statement in the record.

Senator **DeConcini**. Without objection, it is so ordered.

Also, I have a statement by Senator Hatch to be placed in the record.

[The prepared statements follow:]

## SENATE JUDICIARY COMMITTEE

## HEARING ON CHILD PROTECTION, ANTI-OBSCENITY, AND PORNOGRAPHY VICTIMS PROTECTION LEGISLATION
JUNE 8, 1988

## STATEMENT OF SENATOR GORDON J. HUMPHREY

I AM EXTREMELY PLEASED THAT THE COMMITTEE HAS SCHEDULED THIS HEARING ON LEGISLATION TO CRACK-DOWN ON THE POISON OF EXPLOITATIVE PORNOGRAPHY.

AS DEMONSTRATED BY THE FINDINGS OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, PURVEYORS AND PUBLISHERS OF HARD-CORE PORNOGRAPHY CONTINUE TO EXPLOIT AND DEGRADE CHILDREN AND WOMEN. THE PORNO PROFITEERS NOT ONLY DESTROY THE LIVES OF THE YOUTHFUL "MODELS" MANIPULATED IN THEIR OBSCENE PICTURES AND PRODUCTIONS, THEY SPREAD A DISTORTED IMAGE OF SEX WHICH POISONS MILLIONS OF IMPRESSIONABLE YOUNG MINDS.

I AM PLEASED TO BE A CO-SPONSOR OF S.2033, THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT PROPOSED BY PRESIDENT REAGAN. THIS LEGISLATION PUTS REAL "TEETH" IN OUR

FEDERAL ANTI-PORNOGRAPHY LEGISLATION, WITH AN APPROPRIATE FOCUS ON THE SHAMEFUL EXPLOITATION OF CHILDREN BY THE PORN PROFITEERS. I PARTICULARLY SUPPORT THE BILL'S NEW REQUIREMENT THAT PORNOGRAPHERS MUST KEEP RECORDS REFLECTING THE IDENTITY AND AGE OF PERFORMERS AND MODELS. THIS MEASURE WILL HELP PREVENT PORNOGRAPHERS FROM EVADING THE FEDERAL BAN ON EXPLOITATION OF MINORS BY PROFESSING IGNORANCE AS TO THE AGE OR IDENTITY OF THOSE THEY EXPLOIT.

THE AMERICAN PEOPLE STRONGLY SUPPORT TOUGH LEGISLATION TO CRACK DOWN ON CHILD PORNOGRAPHY AND OTHER FORMS OF DEGRADING OBSCENITY. I HAVE RECEIVED AN EXTRAORDINARY VOLUME OF MAIL FROM ALL OVER THE COUNTRY URGING PROMPT PASSAGE OF S.2033. TYPICAL OF THE MAIL I HAVE RECEIVED IS THIS OBSERVATION FROM A MOTHER IN NAMPO, IDAHO:

"WE FINALLY HAVE AN OPPORTUNITY TO CRUSH THE POISONOUS INFLUENCE OF PORNOGRAPHY IN OUR SOCIETY. WHEN THE

PRESIDENT'S "CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1987" REACHES THE SENATE FLOOR FOR A VOTE, PLEASE VOTE FOR ITS PASSAGE. FAMILIES ACROSS AMERICA WILL BE GRATEFUL."

IT IS ESPECIALLY ENCOURAGING THAT TOUGH ANTI-PORNOGRAPHY LAWS HAVE BECOME A BROAD-BASED, BIPARTISAN CAUSE THAT DEFIES ALL IDEOLOGICAL LABELS. PROPONENTS OF THIS LEGISLATION RANGE FROM FUNDAMENTALIST CHURCH GROUPS TO FEISTY FEMINISTS. ONE COMPELLING CAUSE BRINGS THEM ALL TOGETHER: THEY ARE FED UP WITH THE EXPLOITATION OF WOMEN AND CHILDREN, AND THE DEBASEMENT OF LOVING RELATIONSHIPS, THAT IS THE TRAGIC RESULT OF RAMPANT PORNOGRAPHY IN THIS COUNTRY.,

SO I LOOK FORWARD TO HEARING FROM THE WITNESSES TODAY, AND I HOPE THIS COMMITTEE CAN MOVE PROMPTLY TO REPORT EFFECTIVE LEGISLATION TO STOP THE SPREAD OF INSIDIOUS PORNOGRAPHY.

# STATEMENT OF SENATOR ORRIN G. HATCH
# S. 2033, THE CHILD PROTECTION & OBSCENITY ENFORCEMENT ACT AND S. 703, THE PORNOGRAPHY VICTIMS PROTECTION ACT
JUNE 8, 1988

MR. CHAIRMAN, I WOULD LIKE TO THANK YOU FOR HOLDING THIS HEARING TODAY ON TWO IMPORTANT PIECES OF LEGISLATION, S. 2033, THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1988 AND S. 703, THE PORNOGRAPHY VICTIMS PROTECTION ACT OF 1987.

LORD DEVLIN, THE NOTED BRITISH JURIST, STATED IN A BOOK ENTITLED THE ENFORCEMENT OF MORALS THAT: "A SENSE OF RIGHT AND WRONG IS NECESSARY FOR THE LIFE OF A COMMUNITY. WITHOUT IT THE SOCIETY WILL DESTROY ITSELF. HISTORY SHOWS THAT THE LOOSENING OF MORAL BANDS IS THE FIRST STAGE OF DISINTEGRATION."

ANY PERSON OF CANDOR WOULD HAVE TO CONSIDER THE WAVE OF PORNOGRAPHY THAT IS ENGULFING THE NATION AS BOTH A CAUSE AND A SYMPTOM OF THE "LOOSING OF MORAL BANDS" IN OUR COMMUNITIES. SEVERAL OF THE LEADING MONTHLY MAGAZINES IN THE NATION ARE DEVOTED EXCLUSIVELY TO "MALE ENTERTAINMENT." AND DESPITE PREVIOUS LEGISLATIVE EFFORTS, THERE ARE STILL SERIOUS PROBLEMS WITH PUBLICATIONS IN AMERICA FEATURING "CHILD PORN," WHICH USE CHILDREN TO AROUSE SEXUAL DESIRE. IT HAS BEEN ESTIMATED BY LAW ENFORCEMENT OFFICIALS THAT THOUSANDS OF CHILDREN ARE

MALICIOUSLY MANIPULATED AS MODELS IN THE CHILD PORNOGRAPHY INDUSTRY.

POLICE OFFICIALS HAVE REPORTED THAT 77 PERCENT OF THE MOLESTERS OF YOUNG BOYS AND 87 PERCENT OF THE MOLESTERS OF YOUNG GIRLS ADMITTED IMITATING THE SEXUAL BEHAVIOR THEY HAD READ OR SEEN IN PORNOGRAPHIC LITERATURE AND MOVIES. IN ONE GROUP OF RAPISTS, 57 PERCENT ADMITTED CARRYING OUT THE IMPROPER SEXUAL BEHAVIOR THEY WITNESSED IN PORNOGRAPHIC MATERIAL. THE MICHIGAN STATE POLICE, IN A STUDY OF 35,000 SEX CRIMES COMMITTED OVER A 20 YEAR PERIOD, FOUND THAT 43 PERCENT WERE COMMITTED AFTER THE PERPETRATOR OF THE CRIME HAD VIEWED OR READ SEXUALLY EXPLICIT OR DEVIANT MATERIAL.

THE AVAILABILITY OF PORNOGRAPHY HAS BECOME WIDESPREAD. PORNOGRAPHIC FILMS ARE NOW AVAILABLE THROUGH CABLE TELEVISION AND SOLD ON VIDEO CASSETTES. LITTLE CHILDREN, LEFT UNATTENDED IN FRONT OF THE SCREEN, EVEN FOR SHORT PERIODS OF TIME, CAN BE EXPOSED TO VARIOUS FORMS OF PORNOGRAPHY. THE RELATIVELY EASY ACCESS OF THESE MATERIALS AND THE RESULTING SEXUAL ABUSE OF BOTH CHILDREN AND ADULTS IS DESTROYING THE MORAL FABRIC OF OUR NATION. WITHOUT ACTION ON THE PART OF CONGRESS, WE WILL SLIP CLOSER TOWARDS THAT DISINTEGRATION REFERRED TO BY LORD DEVLIN.

AS WE EXAMINE THESE PIECES OF LEGISLATION, WE MUST REALIZE THAT IT IS MORE THAN A MORAL ISSUE. THE STATISTICS QUOTED

PREVIOUSLY AND OTHER SIMILAR STUDIES SHOW THAT PORNOGRAPHIC MATERIAL HAS A NEGATIVE EFFECT ON INDIVIDUALS AND FAMILIES, AND THAT IT IS CLOSELY RELATED TO THE COMMISSION OF SEXUAL CRIMES IN SOCIETY. THE VALUES AND LIVES OF OUR CHILDREN ARE LITERALLY AT STAKE AND IT IS OUR RESPONSIBILITY TO TAKE THOSE STEPS THAT ARE NECESSARY TO PROTECT THEM.

I JOIN WITH THE CHAIRMAN IN WELCOMING OUR DISTINGUISHED WITNESSES TODAY. AS A COSPONSOR OF THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT I WELCOME THEIR COMMENTS AND SUGGESTIONS FOR IMPROVING AND STRENGTHENING THIS BILL. I AM PARTICULARLY INTERESTED IN SOME OF THE ATTACKS THAT HAVE BEEN MADE AGAINST THE OBSCENITY SECTIONS OF THE BILL, AND I HOPE THAT OUR WITNESSES WILL SPEND SOME TIME WITH US IN EXPLORING NOT ONLY THE CONSTITUTIONALITY BUT ALSO THE PREDICTED EFFECTS OF THOSE PROVISIONS.

Senator **DeConcini**. We will now proceed to the first panel. We have four panels this morning with a number of witnesses and we need to conclude by 12 o'clock. So we are going to ask the witnesses to summarize their statements. The full statements will be included in the record. We will impose a 5-minute limit for summary of the statements. We have a number of questions. We will probably have to submit some of them because they go into some detail of the opinions of the witnesses.

Our first witnesses will be Mr. H. Robert Showers, Executive Director, National Obscenity Enforcement Unit of the Department of Justice, and Mr. Brent D. Ward, U.S. Attorney.

Gentlemen, if you would, please take your seats. We lead off with you, Mr. Showers.

## STATEMENT OF PANEL CONSISTING OF H. ROBERT SHOWERS, EXECUTIVE DIRECTOR, NATIONAL OBSCENITY ENFORCEMENT UNIT, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; AND BRENT D. WARD, U.S. ATTORNEY, DISTRICT OF UTAH, SALT LAKE CITY, UT

Mr. **Showers**. Good morning, Mr. Chairman and members of the committee. I appreciate the invitation to testify today on behalf of the Department of Justice with respect to S. 2033, the Child Protection and Obscenity Enforcement Act of 1988. I especially appreciate the chief sponsorship of the chairman, Senator DeConcini, and Senator Thurmond from South Carolina and the other sponsors that are on the Judiciary Committee.

Over the past 15 years, we have seen a rapidly increasing rise in the sexual exploitation of women, sexual abuse of children, public health problems from sexually transmitted diseases such as AIDS, and child prostitution and exploitation, such that many of these are now reaching epidemic proportions nationwide. While most crime statistics have stabilized or decreased, rape in the past 5 years has risen 43 percent and child sexual abuse has risen 175 percent. Clearly, child prostitutes now number in this country in the hundreds of thousands, and sexually transmitted diseases from unsafe sex practices are devastating the human landscape.

Correlations between illegal pornography and rape, illegal pornography and child molestation are well documented. Common sense and law enforcement experience has confirmed the research link, and the public demands a halt to the illegal pornography which violently exploits and degrades women and children in our country.

While all law enforcement in these areas has generally been lax except for the past 2 years, the Federal law enforcement records in 1987 and 1988 show a dramatic increase in obscenity prosecutions: up in 1987 800 percent and in child pornography prosecutions up 250 percent in the past couple years. State prosecutors have also followed this lead. However, without more effective tools which plug loopholes and keep up with technological advances by the criminals, we will lose this battle.

I must admit, on behalf of Federal law enforcement and prosecutors, that we simply do not have the legislative weapons to effectively fight the rise of obscenity, child pornography and child exploitation in America. That is why the Child Protection and Obscenity Enforcement Act of 1988, based primarily on the recommendations made by the Pornography Commission to Congress, is so badly and urgently needed.

In light of these brief opening remarks, let me now review critical portions of the proposed legislation. I will do it in two areas: First, the technological advances have simply outstripped our ability to deal with the problems; for example, computer child pornography. Today, anyone with a home computer and modem, which hooks the computer into a telephone line, has the ability to tap into a complex, nationwide network utilized by child molesters, pedophiles and collectors of child pornography. These networks are used, for example, to exchange the names and addresses of children who have been sexually abused or seem vulnerable, and propose trades of homemade child pornography which is produced when pedophiles record the sexual abuse of children on film or videotape. The technology is even used to send high quality pictures from one computer to another.

Indeed, in our office in the Justice Department, we have, through our computer and modem, tapped into the computer bulletin board featuring child pornography and pulled it right across the lines into the office.

Unfortunately, present law does not cover that kind of criminal activity. Section 101(a) would clarify the existing sexual exploitation of children statutes to prohibit the use of computers to advertise, distribute or receive child pornography and related information.

Second, the recordkeeping provision to which Senator Humphrey referred. Pornography models, actresses and actors are always young. One who is 25 years or 30 years of age, in fact, is rarely seen in pornographic videos and magazines. Sadly, many of those that are presently being used are under the legal age. The Department of Justice is currently prosecuting video producers who have made over 75 video recordings of performer Traci Lords when she was just 15 and 16 years of age.

Section 103 is designed to prevent children from being exploited by the pornographers. The section would require producers of pornography to create and maintain verifiable records pertaining to each performer. It would further require that all pornography contained a statement indicating where the records are kept. Rather than criminal penalties, this provision contains two presumptions, both rebuttable: First, if the records are not kept, the performer is presumed to be a minor; and, second, if the statement required is not present, then all performers are presumed also to be minors.

The other provisions that are important, obviously, in the technological advances are the cable and satellite television obscenity and the dial-a-porn. Just two brief comments about that.

Obscenity is illegal in magazines, illegal on radio, illegal on network television, illegal in movies and videos, but legal by default on cable and subscription television. As we point out in greater detail in our analysis, the current situation of the Cable Communications Policy Act of 1984 is so muddled with respect to obscenity that a change in this law is absolutely necessary. This section would proscribe uttering obscene language or distributing obscene matter by cable or subscription across the television air waves. The section would also permit States to regulate obscene and indecent matter on cable and subscription.

As to the dial-a-porn measure, as you have recognized, there has been a strong bill passed known as the Helms-Bliley bill. Obviously, we drafted this present legislation prior to the passage of that bill. We support strong enforcement in this area and believe that Congress has sent an important message to the dial-a-porn providers with the passage of the changes, particularly in the Senate where the bill passed with a unanimous 98 to 0 vote.

In our judgment, passage of Section 204 in this bill would be duplicative and unwarranted at this time. We would suggest, however, one slight modification to the present law of the Helms-Bliley bill, and that is to raise the penalty for obscene telephone calls to a felony and keep indecent telephone calls a misdemeanor.

The second major provision which is addressed is organized crime, which has gained a serious vice grip on the production and distribution of illegal obscenity and which has increased the whole industry to a $7 to $10 billion a year industry. Of course, it has all the earmarks of organized crime activities: secrecy, tax evasion, money laundering, violence, extortion, murder and more. Pornography's connection to organized crime is well documented, and certainly you have seen that in the Commission's report.

There are four basic provisions we are proposing on which I would comment. First are the syndicate buster amendments.

Senator DECONCINI. Mr. Showers, I am sorry. You are going to have to submit those for the record unless you want to touch on them very quickly. My time is going to be such without giving ample time to the other witnesses.

Mr. SHOWERS. OK. I will touch them quickly.

Syndicate buster amendments, which basically inject common sense into the law, say if it is produced in another State and found in a second State, it is presumed to have traveled in interstate commerce. Forfeiture, I think, is clear. As in the drug forfeiture laws, we now need that in the obscenity area.

RICO and child pornography are also very clear, and the fourth area is wiretap in organized crime investigations, especially in dealing with obscenity. We must have wiretap authority. We do not have that.

In summary, I thank you for hearing these specific comments, and I ask the chairman to introduce our comments into the record.

[The prepared statement of Mr. Showers follows:]

# TESTIMONY OF H. ROBERT SHOWERS

EXECUTIVE DIRECTOR,
NATIONAL OBSCENITY ENFORCEMENT UNIT,
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

ON S.2033, THE CHILD PROTECTION
AND OBSCENITY ENFORCEMENT ACT OF 1988

BEFORE THE JUDICIARY COMMITTEE
UNITED STATES SENATE

JUNE 8, 1988

Good morning Mr. Chairman and Members of the Committee. I appreciate the invitation to testify today on behalf of the Department of Justice with respect to S. 2033, the Child Protection and Obscenity Enforcement Act of 1988. The Department considers the bill to be vitally important to its efforts against child exploitation, child pornography and obscenity. If passed it will provide many important tools to federal prosecutors, putting them on an even footing with the obscenity and child pornography producers and distributors who have for too long been able to take advantage of the lack of adequate laws to prevent the exploitation of children, women and men.

Even a quick review of recent law enforcement statistics and studies, as well as scientific research, reveals the devastating effect obscenity and child pornography are having on our nation. Between 1981-1985 reported child sexual abuse rose by 175%. The rape rate has climbed 43% in the last decade alone and, tragically, the highest incidence of rape victims are teenagers between 16-19.

Recent studies of rapists reveal a correlation between pornography and rape. A 1983 study by Dr. William Marshall of Queens University, Canada, of inmates of Canada's Kingston Penitentiary who were convicted of rape, indicates that 86% of those studied admitted regular use of pornography, with 57%

admitting actual imitation of pornographic scenes in the commission of sex crimes. And a 20-year Michigan state police study by Detective Darrell H. Pope of the Michigan State Police, reveals that 41% of all sexually violent crimes in that state involved hard core pornography either during the commission of the crime or immediately preceding it.

Research conducted by the Federal Bureau of Investigation involving serial murders revealed that 81% of the 36 (29 men out of 36) reported pornography as being one of their highest sexual interests, making pornography one of the most common profile characteristics of serial murderers. New FBI research on serial rapists point toward similar findings.

The correlation between child molestation and pornography is even more convincing. A recent study reported by John Rabun, deputy director of the National Center for Missing and Exploited Children, reveals that out of 1,400 child sexual exploitation cases reported in Louisville, Kentucky, between July 1980 and February 1984, adult pornography was found in all 1,400 cases, and child pornography was found in a significant number of them. We now teach investigators at all our seminars to look for pornography at the scene of sexual crimes involving children. When they do, they repeatedly find it because it is beyond debate that molestation of children is, in part, caused by consumption of pornography.

The 1983 study by Dr. Marshall, which I mentioned earlier, found that 87% of girl child molesters and 77% of boy child molesters studied admitted to regular use of hard core adult pornography. According to the study, the obscene material was used by these sex offenders for three reasons: (1) to stimulate themselves; (2) to destroy the consciences and lower the inhibitions and resistance to sexual activity in their intended child victims; and (3) as teaching tools for the child to imitate or model in their real life sexual encounter with the adult.

Child pornography itself is nothing less than the sexual abuse, rape, and molestation of real children, permanently captured on film, for the profit, entertainment and gratification of child molesters. Many psychologists believe that its dissemination actually harms the child victim emotionally and psychologically more than even the sexual abuse itself, because the child knows the material is always out there, perhaps being used to further molest of other children.

Finally, pornography's connection to organized crime is well documented, with Chief Darryll Gates of LAPD in the Final Report of the Attorney General's Commission on Pornography stating that organized crime controls 85-90% of the estimated $7-10 billion obscenity industry. In closing its section on organized crime the Final Report states that "organized crime involvement in pornography... is indeed significant, and there is an obvious national control directly and indirectly by organized crime figures of that industry in the United States. Few pornographers can operate independently without some involvement with organized crime."

In a nutshell, common sense and law enforcement experiences confirm one essential point: obscenity and child pornography hurt people, both in its production and distribution as well as through the progressive and addictive behavior often produced in the consumers, particularly young people. The obscene material available on the open market in the 1980s is far different in content from that which was available in the 1970s. Today's material includes graphic, violent and degrading depictions of child sex acts, bestiality, torture and bondage in a sexual context, urination and defecation in a sexual context, and heterosexual, homosexual, and transsexual persons performing all manner of deviant sexual behavior. The types of material recently prosecuted in U.S. v. Pryba, U.S. v. Sturman, U.S. v. Gottesman, and U.S. v. Levinson illustrate the violent and degrading, hard core obscenity currently on the open market. I have attached two pages from one of the court's opinions in U.S. v. Pryba which describes the materials involved in that case.

When Attorney General William French Smith chartered the

Attorney General's Commission on Pornography on March 29, 1985, no one expected the conclusions of the Commission somehow to sweep away child exploitation, child pornography, or adult obscenity. Some, in fact, hoped rather that the Commission would sweep them under the rug. But it did neither. In its Final Report, the Commission described the extent of the harms this material inflicts upon women and men, and the dangers it poses to our society, and presented a roadmap to the elimination of these evils. The Final Report: (1) details the advancement in technologies that have made pornography so widely available; (2) discusses the difference between pornography and obscenity; (3) examines the question of harm from pornography; (4) summarizes the social and behavioral science research to that time on pornography; (5) sets forth moving testimony from some of the victims of pornography; (6) exposes the lack of law enforcement against illegal pornography; and (7) reveals the dominance of organized crime in the obscenity industry.

In the Final Report recommendations are made to the Judiciary, law enforcement agencies, citizens, citizen groups, and to legislative bodies at all levels of government. But none are more important to the elimination of the evils of which I speak than those recommendations made to the United States Congress.

The Department of Justice has examined all recommendations made to the federal government, found a great many of them worthy of support, and has moved to implement a comprehensive plan to attack obscenity, child exploitation and child pornography. The cornerstone of that plan was the establishment, within the Department's Criminal Division, of the National Obscenity Enforcement Unit. The Unit has been most successful in its efforts. Prosecutions for child pornography are up by 80% in the last fiscal year and obscenity prosecutions are up by 800%. (Copies of graphs showing these increases are attached.) However, I must admit that we simply do not have the tools to effectively fight the rise in obscenity, child pornography, and child exploitation in America. That is why the Child Protection and Obscenity Enforcement Act of 1988, based, primarily, on recommendations made by the Commission to Congress, is so badly needed.

The Department of Justice provided each Senator with a copy of a lengthy "Analysis of the Child Protection and Obscenity Enforcement Act" prepared by the Department, which provides an in depth analysis of S. 2033. Today I would like only to briefly summarize the effect each section would have if enacted into law.

* * *

# SUMMARY: THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1988

## S. 2033

## SEXUAL EXPLOITATION OF CHILDREN THROUGH CHILD PORNOGRAPHY

SUBSECTION 101 (a) (Amending 18 USC 2251, 2252)

**Computer Porn**: Today, anyone with a home computer and a modem, which hooks the computer into a telephone line, has the ability to tap into a complex nationwide network utilized by child molesters, pedophiles, and collectors of child pornography. These networks are used, for example, to exchange the names and addresses of children who have been sexually abused or seem vulnerable, and to propose trades of home-made child pornography, which is produced when pedophiles record the sexual abuse of children on film or videotape. The technology is even used to send high-quality pictures from one computer to another. Indeed, in our office we have, through our computer and modem, tapped into a computer bulletin board featuring child pornography.

Section 101 (a) would clarify the existing Sexual Exploitation of Children statutes, 18 U.S.C. 2251 and 2252 to prohibit the use of computers to advertise, distribute or receive child pornography and related information. Maximum Penalty: 10 yrs. and/or a felony level fine. Repeat Offenders: 5-15 yrs.

SUBSECTION 102 (a) (Adding 18 USC 2251[a])

Buying and Selling of Children: Sadly, current federal law does not forbid a parent or other adult with custody of a minor, such as a babysitter or day care worker, from selling or offering to sell that child for use in the production of pornography, or from assisting in its production. Subsection 102 (a) would prohibit a parent, legal guardian, of any person having custody or control of minor from selling or otherwise transferring custody or control of that minor or offering to do so where the person has knowledge that the minor would be used for the production of pornography or where the person acts to promote either the minor's engaging in sexually explicit conduct or assisting another to do so for the purpose of producing a visual depiction of such conduct. Penalty: 20 yrs. to life and a felony level fine.

SECTION 103 (Adding 18 USC 2257)

Recordkeeping: Pornography's "models", "actresses" and "actors" are always young. One who is 25 to 30 years of age is virtually never seen in pornographic videos or magazines. Sadly, many of those used are under legal age. The Department of

Justice is currently prosecuting video producers who made over 75 videos using performer Traci Lords when she was just 15 and 16 years of age.

Section 103 is designed to prevent children from being exploited by pornographers. The section would require producers of pornography to create and maintain verifiable records pertaining to each performer. It would further require that all pornography contain a statement indicating where records are kept. Rather than criminal penalties, this provision contains two presumptions, both rebuttable: First, if the records are not kept, the performer is presumed to be a minor; Second, if the statement required is not present, then all performers are presumed to be minors.

SECTION 104 (Amending 18 USC 1961, et seq.)

RICO and Child Porn: Currently, the Racketeer Influenced and Corrupt Organizations (RICO) statute may be used for obscenity violations but not for child pornography violations. If the RICO statute is appropriate for obscenity (and it certainly is) then it is even more important that it be used to halt child pornography.

While most people working in this field believe that much of the child pornography in this country is still traded back and forth between sexual deviants much like baseball cards, there is little doubt that the commercial market in this particular perversion is a growing one. Whether directed at the nationwide pedophile network or the international, organized criminal enterprises controlling the commercial distribution, stronger tools are needed. It is therefore appropriate for Section 104 of this bill to add child pornography to the RICO statute as a predicate offense. As you know, RICO provides strong criminal penalties and fines, and brings forfeiture provisions into play, allowing the seizure and sale of all assets used in or obtained through organized criminal activity. Maximum Penalty: 20 yrs. and/or a felony level fine.

## OBSCENITY

SECTION 201 (Adding 18 USC 1466)

Interstate Transport - Intent to Sell: While it is currently illegal to transport obscene material over state lines, it is not illegal to receive or possess that same material with intent to sell it or transfer it, or to offer to do so. Yet distributors of obscenity actively promote the evils it entails, including rape, AIDS, and family disintegration. Distributors are necessary links in the chain, without which these materials would be contained. Thus, this section provides stiff penalties for those with greater culpability.

Under this section, if an individual receives or possesses obscene matter with an intent to sell or transfer it, he or she may receive a sentence of up to two years and/or up to $250,000. Furthermore, the Section creates a rebuttable presumption that one who offers to sell or transfer two or more obscene articles or publications is engaged in the business of selling such material, in which case punishment would be up to five years and/or $250,000.

### "SYNDICATE BUSTERS"

As I mentioned in my opening remarks, Organized Crime -- both La Cosa Nostra and its associates as well as other organized entities -- is playing an ever-increasing role in the multi-billion dollar obscenity industry. ~~We are~~ overdue for tailoring federal law to deal with this reality. Three additions to existing law, referred to as "syndicate buster" amendments, because they would aid us against organized crime syndicates, would help put prosecutors on an even legal footing when pursuing organized crime in these areas.

### SUBSECTION 201 (c) (Amending 18 USC 1465)

**Interstate Transport - Facility or Means**: The first would prohibit the use of a "facility or means" of commerce for obscenity trafficking. Thus, the use of a federal interstate highway system, federally financed highways, and interstate railroads would trigger this section, as would the use of a "means of interstate commerce" such as the use of motor vehicles, boats, and airplanes. It would not be necessary to demonstrate that obscene material actually traveled interstate but only that a "facility or means" of interstate commerce was used. Maximum Penalty: 5 yrs. and/or a felony level fine.

SUBSECTION 201 (d) (Adding 18 USC 1469)

**Interstate Transport - Presumption**: The second will allow a jury to presume that obscenity produced in one state and now located in another state has in fact travelled in interstate commerce. This will apply in a similar fashion to material produced in a foreign country.

SUBSECTION 201 (f) (Amending 18 USC 1952)

**Acts Furthering Illegal Activity**: The third of these amendments will make illegal in and of itself any interstate travel or the use of a facility in interstate commerce or the mails regarding the furtherance of acts which are illegal under state or federal obscenity laws. This means, for example, that an interstate phone call from a retailer to a distributor regarding an interstate shipment of obscenity, or the use of the mails to pay for such a shipment, would itself be a criminal offense, as well as a RICO predicate act.

SUBSECTION 202 (a) (Adding 18 USC 1467 and 1468)

**Forfeiture**: This section will add both criminal and civil forfeiture statutes, allowing the government to obtain assets attributable to profits made through violations of obscenity laws and to obtain certain instrumentalities used to produce such material. This is the only feasible way to dismantle criminal enterprises.

Some have argued that forfeiture, while appropriate for drug offenses, is inappropriate for obscenity offenses because materials forfeited, such as magazines or videos, may have first amendment protection. Such arguments indicate a total misunderstanding of forfeiture laws. The purpose of forfeiture provisions is totally unrelated to the nature of the assets in question. The purpose of forfeiture laws is to disgorge assets acquired through, or used for, illegal activity. It makes no constitutional difference whether a video store is selling drugs or obscene videos. If the proceeds of the illegal activity are used to buy videos, magazines, or, for that matter, drugs, forfeiture provisions are appropriate for the purpose of ending the illegal activity. Simply stated, it is irrelevant whether assets derived from violations of law are or are not obscene. Prosecution of national and international drug cartels have underscored the importance of forfeiture provisions on numerous occasions.

Forfeiture, of course, also provides much-needed funds and equipment to the federal efforts and, as in drug forfeiture, allows for sharing of forfeited assets with state and local law enforcement organizations involved in joint investigations. Section 202 would allow for sharing with state and local law enforcement and would provide a substantial inducement to increased prosecution at those levels. A similar sharing provision is added in the division of the criminal and civil forfeiture provisions made in subsection 202 (b) of the bill.

SECTION 205 (Adding 18 USC 1460)

**Federal Lands**: This provision will make the sale of obscenity on any federal lands a felony, and the mere possession of child pornography on these lands will itself become an offense. Maximum Felony Penalty: 2 yrs. and/or $250,000. Maximum Misdemeanor Penalty: 6 mos. or $5,000. Maximum Corporate Penalty: $10,000.

SECTION 206 (Amending 18 USC 2516)

**Electronic Surveillance**: A serious effort against organized crime requires that federal law enforcement officials be permitted to use the federal wiretap statute. This section would add federal obscenity felonies to the list of crimes for which the government may seek a court order authorizing wiretaps.

## CHILD PROTECTION AMENDMENTS

SECTION 203 (Adding 18 USC 1464[a])

**Cable and Subscription TV**: Obscenity is illegal in magazines, illegal on radio, illegal on network television, illegal in movies and videos, but legal-by-default on cable and subscription television. As we point out in greater detail in our "Analysis" the current situation with the Cable Communications Policy Act of 1984 (P.L. 98-549) is so muddled with respect to obscenity that a change in the law is necessary. This section would proscribe uttering obscene language or distributing obscene matter by cable television or subscription services on television. Penalty: 2 yrs. or $250,000. The section would also permit states to regulate obscene or indecent matter on cable or subscription television.

SECTION 204 (Amending 47 USC 223)

Dial-a-Porn: This section was drafted prior to the time Congress amended 47 USC 223 by attaching an amendment to the "Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvements Act with changes that take effect July 1 of this year. We support strong enforcement in this area and believe that Congress has sent an important message to the dial-a- porn providers with the passage of the changes, particularly in the Senate where the bill passed by a vote of 98 to 0. In our judgment passage of section 204 would be duplicative and unwarranted, at this time. We would suggest one slight modification, however, to the bill which Congress recently passed. We suggest that Congress raise the penalty for obscene calls to a felony.

## Summary

Plainly, under current federal law some very basic tools are being withheld from prosecutors. It's simply not a level playing field. The producers and distributors of obscenity and child pornography -- the heartless victimizers of women and children -- have had a huge legal advantage, and they have used it to the fullest. They have also employed the latest technologies, while federal law has failed to keep pace. It's high time these inequities were corrected.

When the Child Protection and Obscenity Enforcement Act of 1988 is passed we will all be able to go about the business of cleaning up some of the filth that floods our nation. At the Department of Justice this process is already well under way. And though Congress has provided many weapons for our battle, we need more. We need strong, loophole-free federal laws. The industry we seek to shut down is very large, very powerful, and very wicked.

We are pleased to see that this bill has received great bi-partisan support because the problem of rape, child molestation and obscenity affects liberal and conservative, Democrat and Republican alike. Child molestation and rape is simply not a political issue. It affects all American children and families. Obscenity and child pornography are not just moral and religious issues -- they are increasingly matters of public health and public safety.

## Pornography Victims Protection Act of 1987

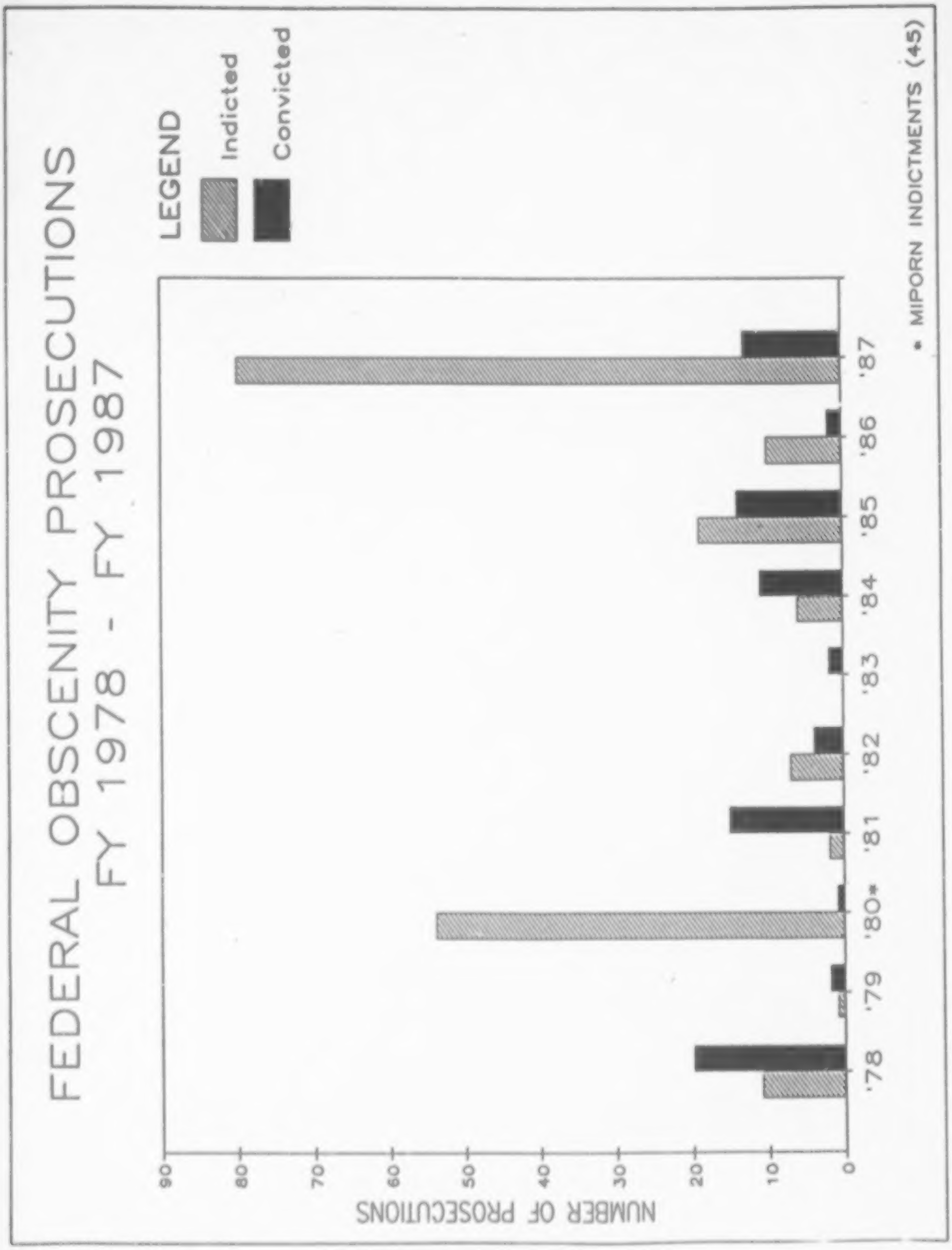
## S. 703

Let me also comment briefly on S. 703, a bill that makes several changes in the chapter 110 of title 18, the chapter dealing with child pornography. Under current law, this chapter is concerned with making and trafficking in sexually explicit video depictions of minors, defined as persons under 18 years of age. One key change it to create a new offense of making video depictions of sexually explicit conduct of persons 18 years of age or older by means of coercion, intimidation, or fraudulent inducement. Although such cases might present difficult factual situations and be difficult to prove, especially in cases in which fraudulent inducement was alleged, the desire to criminalize such conduct is understandable. In our view it is bad enough to make obscene pictures or video tapes. It is far worse if the persons portrayed were caused to do so by coercion, intimidation, or fraud. We are concerned, however, about placing this provision in the child pornography chapter. That chapter, as you know, was extensively revised following the Supreme Court's 1982 decision in New York v. Ferber, 458 U.S. 757. It reflects the Court's holding that depictions off child pornography may be prosecuted even though they do not meet the legal definition of obscenity. Indeed, it extends special protection to children. To insert a provision dealing with pornographic visual depictions of adults in this chapter opens thee door to the possibility that the key distinction between child and adult pornography will become blurred by the courts.

S.703 also adds sections providing for injunctive relief for violations of the child pornography chapter -- both for violations of the existing offenses and for the new offenses involving the coercing, intimidating, or fraudulently inducing adults to be depicted in pornography. It also adds a provision allowing a suit for damages by victims of both types of offenses if they suffered physical injury, emotional distress, or property damage as a result of the offense. Again, we think it is unwise to treat victims off adult pornography and child pornography the same. For example, the bill would allow the same type of injunctive relief against the producers of adult pornography that did not meet the definition of obscenity as would be available for use against producers of child pornography. Injunctive relief prohibiting future publication of non obscene -- even though pornographic -- material involving only adults may well raise an even more difficult constitutional issue than such injunctive relief directed only at child pornography.

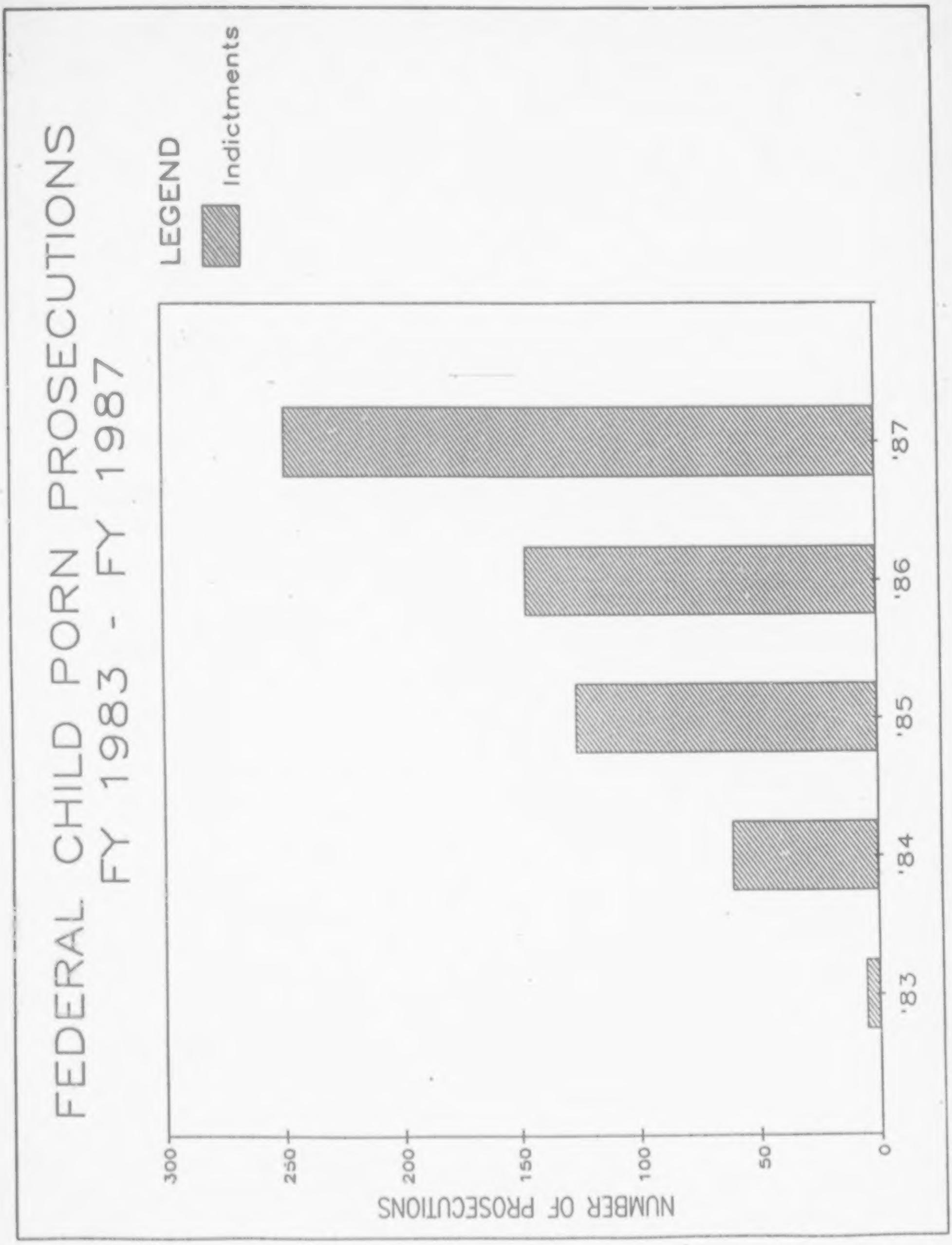
As for allowing suits for monetary damages by victims of both adult and child pornography, I have one observation. The drafters of the bill were apparently unaware that section 2255 of title 18 (added at the end of the 99th Congress) already sets out a civil remedy for persons injured as a result of a child pornography statute.

Mr. Chairman, there are some technical drafting errors in S.703 that we would hope to be able to discuss with the Committee staff if the Committee decided to process this bill further.



FEDERAL OBSCENITY PROSECUTIONS
FY 1978 - FY 1987

* MIPORN INDICTMENTS (45)


FEDERAL CHILD PORN PROSECUTIONS
FY 1983 - FY 1987
LEGEND
▨ Indictments
NUMBER OF PROSECUTIONS
0
50
100
150
200
250
300
'83
'84
'85
'86
'87

against admissibility, it is necessary to describe in some detail the nature of the charged materials.[3]

### *The Charged Materials*

The charged materials consist of four videotapes and nine magazines. Each is separately described.

1. *She-Male Confidential, Bizarre Encounter # 9.* This video depicts a variety of sexual activities involving "she-males"—persons who have female bodies, including fully developed breasts. They are women in all respects save one: they have male genitalia. In the first scene, two she-males dressed as women engage in fellatio and anal intercourse with a man. The second vignette depicts a she-male inserting what appears to be a large pipe into a woman's anus. The she-male and the woman also engage in vaginal and anal intercourse. The third scene, captioned "Spanked by a Stranger," shows a man throwing a she-male to the ground and performing fellatio upon the she-male. The man then has anal intercourse with the she-male.

2. *Wet Shots.* This video features men and women engaged in vaginal and anal intercourse and oral sex. Many of the scenes involve groups of men and women. The film also contains close-up depictions of male ejaculations on the bodies and faces of others. In one scene, men are shown ejaculating into a glass of liqueur. A woman then drinks the mixture.

3. *The Girls of the A-Team.* This film, as the title might suggest, is devoted chiefly to showing anal intercourse between men and women, in couples and in groups. The film also depicts a variety of other sexual activities between women in couples and larger groups, including vaginal and anal insertion of a range of objects.

4. *The Punishment of Anne.* This video predictably has a sado-masochistic theme. A woman and a man subject a younger woman to various forms of degradation, including forcing her to urinate in front of them, photographing her while she is naked and in various positions of bondage, whipping her while she is naked, inserting vegetables into her vagina, putting chains on her and sticking pins into her breasts.

The content of most of the magazines is also sado-masochistic in nature.

1. *Torment* depicts nude and partially clad women bound and suspended by ropes, chains and straps in contorted positions. Ropes and straps appear frequently in the genital area. Many of the women have tortured expressions on their faces. Welts, whether actual or simulated, appear on some of the women. The accompanying text deals exclusively with bondage and includes descriptions of the sexual pleasure which the sadistic party derives from forcing the victim to endure painful positions of bondage for long periods of time.

2. In *She ... Who Must Be Obeyed,* a woman is shown subjecting a nude man to bondage and whipping. Acts of violence to the man's genitals are also vividly depicted.

3. *Bottoms Up* chiefly depicts nude women being spanked with hands and with objects such as canes and whips. The buttocks of several of the women appear to be red and bruised as if flagellation were actually taking place. The stories involve the sexual gratification which both the abusers and victims receive from this bizarre activity.

4. In *Slave Training,* acts of abuse to male and female genitals are shown in cartoons and photographs. In several photographs, mousetraps and tourniquet devices are pictured on women's breasts. One woman's breasts have actually become purple due to tourniquets. The text focuses

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[3] Significantly, the exercise of describing these materials confirmed a fact that played some role in the Court's decision on these materials, namely, that language, however rich for some purposes, is simply unequal to the task of conveying to a reader what the visual images convey to the viewer. There is, no doubt, a large difference in communicative impact and effect between the written phrase "homosexual fellatio and anal intercourse" and the vivid depiction of it on video. For example, the latter might well be patently offensive, while the former may not. This difference in sensory impact should be taken into account in making judgments about the relevance and probative value of certain of defendant's proferred evidence.

on various forms of emotional and physical abuse, such as insertion of steel rings into a woman's nipples and caning of a man's penis.

5. *Tied Up* depicts naked and partially clad women in various states of bondage and includes several close-up photographs of women's genitals.

6. Finally, the photographs in *Super Bitch* depict female domination and male submissiveness.

The remaining three magazines contain graphic depictions of female genitals. *Tender Shavers* shows young women shaving their pubic hair and masturbating. Whether some of the models are adults or juveniles is unclear. Bobby socks, ponytails and makeup are employed to underscore, if not create, the appearance of adolescence, presumably to appeal to hedophiles. *Crotches* contains prominent, almost clinical, displays of young women's genitals. The accompanying text makes clear that the reader is supposed to believe that the models are teenage girls. The last magazine, *Poppin Mamas*, depicts naked pregnant women in lascivious poses.[4]

### A. *Public Opinion Poll*

Defendants attempted to introduce into evidence the results of a public opinion survey to demonstrate the community's attitude, toleration or standards with regard to sexually explicit materials. At the direction of John B. McConahay, Ph. D.,[5] a public opinion survey firm conducted the poll through telephone calls. After asking preliminary questions about the extent of the interviewee's involvement in the community, the interviewers were directed to say:

> The next few questions deal with X-rated videos and adult movies and magazines. The nudity and sex shown in these types of adult materials include: nude bodies and close-up, graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these by adult performers.

Each respondent was then asked 1) whether he thought that the portrayal of "nudity and sex" in materials available to adults only had become more or less acceptable in recent years; 2) whether he agreed or disagreed with the statement that adults who want to should be able to obtain and view materials depicting "nudity and sex;" 3) whether he believed that he should be able to buy or rent materials depicting "nudity and sex;" and 4) whether he agreed or disagreed with the statement that adults who want to should not be able to buy or rent materials depicting "sex and nudity."

The government objected to the introduction of this survey on the grounds that it was both irrelevant to the issues in this case and methodologically flawed. After examining the poll, its methodology and results, the Court ruled that the proffered opinion poll was not relevant to whether the charged materials were obscene and therefore excluded evidence concerning the poll. The Court also concluded that even if relevant, the probative value of the poll was so slight that it was plainly outweighed by the unfair prejudicial effect the poll would have had. *See* Fed.R.Evid. 403.

Evidence concerning the poll was irrelevant because the pollster's questions were not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials. Rather, the questions focused more on the general political question whether adults should be able legally to obtain pornography. In other words, the poll's questions seemed designed to measure public opinion not on whether the charged materials were accepted in the

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[4] Not surprisingly, defendants did not argue at trial that the materials possessed serious literary, artistic, political or scientific value. *See Miller*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614–15, 37 L.Ed.2d 419.

The jury found the defendants guilty under 18 U.S.C. § 1465 as to all the materials at issue, with the exception of three magazines. A not verdict of guilty was returned for *Super Bitch.* The jury was unable to reach a verdict as to *Crotches* and *Poppin Mamas.*

[5] Dr. McConahay has a Ph.D. in social psychology and is an associate professor of policy sciences and psychology at Duke University.

Senator DeConcini. Your full statement will be in the record, and we thank you, Mr. Showers, for going into the specifics of the bill and recommendations to make it more effective and more viable. We will certainly take that under consideration.

Mr. Ward.

## STATEMENT OF BRENT D. WARD, U.S. ATTORNEY, DISTRICT OF UTAH, SALT LAKE CITY, UT

Mr. Ward. Thank you, Mr. Chairman.

My name is Brent Ward, and I am the U.S. Attorney for the District of Utah. I am also chairman of a committee of U.S. attorneys dealing with the subjects of obscenity, child pornography and organized crime. It is a pleasure today to be here to speak in support of the President's proposal. On behalf of the 93 U.S. attorneys, I express appreciation to you, Mr. Chairman, for your support of this legislation.

Historically, Federal prosecutions of both adult obscenity and child pornography have been sporadic and infrequent. Lately, however, U.S. attorneys have been more active in this area. In fact, I am happy to report that in the past 2 years alone U.S. attorneys in nearly every one of the 93 Federal districts have prosecuted child pornography cases. At the same time, prosecutions of adult obscenity have gone up. At least 45 U.S. attorneys, about half of the total, are currently involved in the investigation or prosecution of adult obscenity violations.

As we have entered this arena, we have learned two important lessons. First, market power in the public marketplace for sexually oriented material has steadily gravitated toward a relatively small number of enterprises engaged in the pornography trade. And as this has happened, the pornography industry has become less and less responsive to local and State law enforcement. This has made Federal obscenity enforcement not only unavoidable but absolutely necessary.

The second thing we have learned is that in recent years the means of distributing pornography have changed dramatically. Driven by avarice, the purveyors of pornography are seizing upon and exploiting every new development in communications technology for the purpose of distributing more material that is more graphic and more violent to more people for more money. Yesterday, obscenity was confined to the seedy theater and bookstore. Today, it is as close as the telephone and the VCR.

Federal obscenity laws, most of which trace their roots to the late 19th century, have become obsolete in many respects. That is one reason why passage of S. 2033 is so important. This bill is urgently needed if we are to battle pornography on an equal footing.

With this background, I would like to address just a few specific points in the President's proposal. If these provisions pass, Mr. Chairman, I guarantee that they will immediately be pressed into service in the fight against obscenity.

Mr. Showers has already commented on the requirement of recordkeeping entries. This recordkeeping requirement would be an added burden but only for producers of material which, by its very nature, poses a risk of serious harm to children. Meanwhile, the recordkeeping requirement would significantly enhance the ability of U.S. attorneys to prosecute and convict the producers and distributors of child pornography. The issue of performers' ages would no longer be the battleground that it is today in these cases.

The syndicate buster amendments are intended to plug loopholes in existing law. One important amendment would simplify the requirement of proving the interstate nexus required in Federal obscenity cases. Under this particular proposal, proof that an obscene videocassette was produced, say, in Los Angeles, CA, and later purchased at a store in Salt Lake City would give rise to a rebuttable presumption that the videocassette in question in fact traveled in interstate commerce. Unless this presumption was rebutted by the defendant, specific proof as to how, when and where the videocassette traveled across a State line would not be required.

In fact, it has been our experience, Mr. Chairman, as U.S. attorneys, that the present requirement of such specific proof is a weakness in the law which is systematically exploited by pornography enterprises who are thereby able to evade the law and obstruct investigations and prosecutions.

The bill would also authorize both criminal and civil forfeitures. By now, it is safe to say that the biggest boost to Federal drug law enforcement in recent years has been the adoption of statutes authorizing the forfeiture of assets in drug cases. Well, the same would be true of obscenity cases.

Pornography enterprises have simply grown so large that the removal of current management in a prosecution often has no appreciable effect upon the ongoing operations of the enterprise. We are simply not likely to have any lasting influence on the rapidly expanding pornography industry without the ability to seize and forfeit assets which are used in the commission of the offense or purchased with proceeds of these crimes.

Finally, this bill contains new technology provisions. I would especially like to draw your attention to the dial-a-porn provision. That is the only one on which I am going to comment. When the Helms-Bliley bill was under consideration by Congress, the Department of Justice strongly urged that obscene dial-a-porn be punishable as a felony, which would bring this obscenity offense into line with the penalties for other obscenity offenses in title 18. Our experience simply demonstrates that misdemeanor treatment, even when accompanied by substantial fines, lacks the necessary deterrent effect in the lucrative dial-a-porn trade.

I know that U.S. attorneys will be more apt to prosecute offenses if they know that the substantial effort required to do so will result in felony convictions and an increased likelihood of meaningful punishment and genuine deterrence.

I appreciate this opportunity to support Senate bill 2033. I am convinced that passage of this bill will place into the hands of U.S. attorneys the means to enforce obscenity and child pornography laws with greater efficiency and better results. If you give us these tools, I promise you we will put them to work.

Thank you.

[The prepared statement of Mr. Ward follows:]

# STATEMENT

OF

BRENT D. WARD
UNITED STATES ATTORNEY
DISTRICT OF UTAH

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING S. 2033

10:00 a.m.
JUNE 8, 1988
ROOM SD-226
DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, D.C.

Mr. Chairman, my name is Brent Ward and I am the United States Attorney for the District of Utah. I am also Chairman of a committee of United States Attorneys dealing with the subjects of child pornography, obscenity and organized crime. It is a pleasure for me to be here today to speak in support of S. 2033, which the President proposed last November and sent to you under the heading "Child Protection and Obscenity Enforcement Act of 1987".

As a preface to my comments about this legislation, I would like to report to you briefly on the progress we are making in the prosecution of child pornography and adult obscenity at the federal level. It is one of the untold success stories of this administration.

Historically federal prosecutions of both adult obscenity and child pornography were sporadic and infrequent. In fact, until 1984 federal prosecutions for child pornography offenses were almost nonexistent. Meanwhile, in July 1986 the Attorney General's Commission on Pornography reported that very few federal prosecutions of adult obscenity were being brought. According to the Commission's Final Report, as of February 1986 adult obscenity cases were pending in just two federal districts.

I am happy to report that in the past two years alone U.S. Attorneys in nearly every one of the ninety-three federal districts have prosecuted child pornography cases. The number of cases has increased from less than ten in 1983 to 61 in 1984, 126 in 1985, 147 in 1986 and 244 last year. At the same time prosecutions of adult obscenity have gone up. At least 45 U.S. Attorneys (about half of the total) are now actively investigating or prosecuting adult obscenity violations. More importantly, the conviction rate in these cases is very high and the targets in most cases are major nationwide distributors of hardcore material.

This progress has come about because the President, the Attorney General and U.S. Attorneys generally have for the first time in history made the prosecution of obscenity and child pornography a priority at the Department of Justice. This is of course only a reflection of growing public demand for action.

As we have entered this arena, we have learned some important lessons. Two bear mentioning here. First, within the space of just twenty-five years, pornography has become a $ 6-8 billion industry in the United States. Today the American people find themselves at the vortex of heated competition among mega-scale enterprises engaged in the crass exploitation of human sexuality. No one would deny that these forces have brought about remarkable changes in our social landscape. For example, as market power in the public marketplace for sexually-oriented material has gravitated toward a relatively small number (perhaps 25 or fewer) of enterprises, the pornography industry has become less and less responsive to law enforcement at the state and local levels.

The assets of these enterprises are now so large and so far-flung that it is no longer possible for local prosecutions to have any significant impact upon this industry, or even upon a single large-scale purveyor of pornography. In my opinion these businesses have grown so large that only a coordinated strategy of multiple prosecutions at the federal level offers any real hope of reducing their influence and deterring their criminal conduct. Our initial experience with multiple federal prosecutions bears this out.

The second thing we have learned is that in recent years the means of distributing pornography have changed dramatically. It is obvious that we in law enforcement have been left in the dust. Driven by avarice the purveyors of pornography are seizing upon and exploiting every new development in communications technology for the purpose of distributing more material that is more graphic and more violent to more people for more money. Yesterday obscenity was confined to the seedy theater and bookstore. Today it is as close as the telephone, the VCR and the personal computer. Yesterday children were protected by the warning "Adults Only". Today they are exceedingly vulnerable and no warning will help.

Because of the technological sophistication and the sheer financial strength of pornography enterprises we find ourselves behind the curve. For one thing federal obscenity laws, most of which trace their roots to the late 19th century, are fast becoming obsolete. That is why passage of S. 2033 is so important. This bill is urgently needed if we are to battle the pornography industry on an equal footing.

Let me clarify what I am talking about here. Although I have referred to both pornography and obscenity, I use the word "pornography" only to describe the industry in question and as part of the term "child pornography", which refers to that form of obscenity depicting children engaged in sexual conduct.

The word "pornography" by itself generally denotes the large genre of sexually-oriented material of which only a portion would be considered legally obscene. I assure you that the priority of the Department of Justice is the prosecution of hardcore material which federal grand juries conclude is legally obscene and therefore outside the scope of protection afforded by the First Amendment. Obscenity is illegal. It may be prosecuted. People may go to prison for producing and distributing it. The Constitution does not protect it.

May I also remind you that the role of a prosecutor in obscenity cases is unique. The Supreme Court's decision in the 1973 case of Miller v. California makes it clear that the question "What is obscene?" is controlled not by the prosecutor but by the contemporary community standard of each community. The community standard is what juries say it is as they consider materials brought before them in criminal cases. It is impossible for a community to articulate a standard of obscenity unless prosecuting attorneys bring cases and present materials to juries for decisions. In this sense the prosecutor is the means whereby a community decides for itself what is or is not obscene. Without prosecutions a community is powerless to articulate its standard of obscenity. Therefore, although at times it may seem that prosecutors are imposing their views of morality on the rest of the community, in reality they are only presenting the community with an opportunity to decide for itself what its standard of obscenity is.

With this background I would now like to explain to you why the President's proposal is so important to United States Attorneys. I will address four portions of S. 2033 that are of particular interest to U.S. Attorneys hoping that our perspective may be of assistance to you. These include the recordkeeping provision, the "syndicate buster" amendments, the forfeiture provisions and the "new technology" provisions. U.S. Attorneys want and need these provisions, along with the rest of the bill. If these provisions pass, I guarantee they will immediately be pressed into service in the fight against obscenity.

## Recordkeeping

In federal child pornography prosecutions brought under current law the battleground is often the issue of whether the performer was a minor and whether the producer or distributor knew that the performer was a minor.

The recordkeeping requirement of S. 2033 would require the producer of any material containing visual depictions of actual sexually explicit conduct (as compared to simulated conduct) to keep records of the actual age and identity of each performer. Furthermore, every copy of such material must contain a statement indicating where these records are located.

If a producer fails to keep such records, or if a distributor sells the material without the required statement indicating where the records may be found, a rebuttable presumption arises that the performer shown in the material was not a minor. That presumption would apply in any subsequent prosecution for sexual exploitation of children.

This recordkeeping requirement would be an added burden, but only for producers of material which by its very nature poses a risk of serious harm to children. Meanwhile, the recordkeeping requirement would significantly enhance the ability of U. S. Attorneys to prosecute and convict the producers and distributors of child pornography. The issue of performers' ages would no longer be the battleground it is now.

## "Syndicate Buster" Amendments

The "syndicate busters" amendments are intended to plug loopholes in existing law which unnecessarily tilt the scales in favor of defendants in federal prosecutions of adult obscenity. For example, under present law prosecutors are required to prove that obscene material actually traveled interstate in order to satisfy the jurisdictional requirement essential for federal prosecution. It may be necessary to trace the path of the material from beginning to end in order to show when, where and how it crossed a state line. This is more than the Constitution requires. If S. 2033 passes, it would only be necessary to show that a facility or means of interstate commerce, such as the interstate highway system, was used to transport the material, even if the facility were only used intrastate. A single shipping document or a single witness could provide this proof.

Another amendment would offer an alternative means of proving the interstate nexus required in federal obscenity cases. Under this amendment proof that an obscene videocassette was produced in Los Angeles and later purchased at a store in Salt Lake City would give rise to a rebuttal presumption that the videocassette in fact traveled in interstate commerce. Unless this presumption was rebutted by the defendant at trial, no proof as to how, when and where the videocassette crossed a state line would be required.

It has been our experience as U. S. Attorneys that the present requirement of specific proof that obscene material traveled in interstate commerce is a weakness in the law which is systematically exploited by the distributors of pornography industry. By using a variety of commercial carriers, transporting material by private conveyance, and by falsifying, destroying or failing to keep records, distributors are able to obstruct and in some cases prevent investigations and prosecutions. This would be much more difficult to do if S. 2033 became law. U.S. Attorneys will love these "syndicate buster" amendments because they will make our job easier at the same time meeting all constitutional requirements.

## Asset Forfeiture

The bill would also authorize both criminal and civil forfeitures in obscenity cases. By now it is safe to say that the biggest boost to federal drug law enforcement in recent years has been the adoption of statutes authorizing the forfeiture of assets in drug cases. In my own opinion the impact of asset forfeiture has exceeded even the impact of mandatory minimum sentences in drug cases as a means of punishing and deterring drug crimes.

The same would be true in obscenity cases. Forfeiture of assets used in the commission of obscenity offenses or purchased with the proceeds of these crimes may prove to be the best available means of actually breaking up criminal enterprises engaged in the production and distribution of obscenity.

These enterprises have grown so large that the removal of current management often has no appreciable effect upon the operations of the enterprise. As soon as the principals in the entererprise are prosecuted, other persons take their place and it is back to business as usual. We are simply not likely to have any lasting influence on the rapidly expanding pornography industry without the ability to seize and forfeit assets. Asset forfeiture succeeds because it removes the means by which these crimes are committed.

## "New Technology" Amendments

Finally, S. 2033 contains "new technology" provisions. One of these would for the first time prohibit the broadcast of obscenity by cable and subscription television. This would merely give us the capability of prosecuting obscenity in this form in the same manner that we currently prosecute obscenity in the form of printed matter, movies and videocassettes.

I would especially like to draw your attention to the dial-a-porn provisions of the bill. I speak to you now as the only U. S. Attorney so far to attempt to prosecute a dial-a-porn company. The fact that I have been alone in bringing such prosecutions, however, is not so much a sign of disinterest by the Department of Justice as it is a sign that the law has been inadequate.

A recent attempt to cure that inadequacy resulted in passage of the Helms-Bliley bill recently signed into law by the President. However, even Helms-Bliley is seriously deficient in one important respect. Under this law obscene dial-a-porn messages will be punishable only as misdemeanors.

When Helms-Bliley was under consideration by Congress, the Department of Justice strongly urged that obscene dial-a-porn be punishable as a felony. This would bring the penalty for this obscenity offense into line with the penalties for other obscenity offenses under Title 18 (18 U.S.C. § 1461-1465).

Our experience demonstrates that misdemeanor treatment, even when accompanied by substantial fines, lacks the necessary deterrent effect in the lucrative pornography industry. Remember that according to the Court of Appeals for the Second Circuit in Carlin Communications, Inc. v. F.C.C., 787 F.2d 846, 848 (2nd Cir. 1986), over 7,900 calls can be connected at once to a single dial-a-porn number. In 1985 the number of calls ran between 6 and 7 million per month on Carlin's New York lines, yielding approximately $130,000 in monthly gross revenue with very little overhead.

With profits so high the risk of misdemeanor prosecution is easy to take. Furthermore, I know that U.S. Attorneys will be more apt to prosecute these offenses if they know that the substantial effort required to do so will result in felony convictions and an increased likelihood of meaningful punishment and genuine deterrence.

Under S. 2033, felony treatment for dial-a-porn could easily be accomplished merely by treating obscene dial-a-porn as a felony offense.

I appreciate this opportunity to present testimony in support of S. 2033. I am convinced that passage of this bill will place into the hands of U.S. Attorneys the means to enforce obscenity laws with greater efficiency and better results. If you give us these tools, I promise you we will put them to work.

Thank you.

Senator DeConcini. Mr. Ward, thank you very much.

Am I correct in saying that you are the first and perhaps the only U.S. attorney who has successfully prosecuted dial-a-porn?

Mr. Ward. Yes, that is correct, Your Honor.

Senator DeConcini. Thank you for the promotion. [Laughter.]

Can you give us a little bit of background on that case?

Mr. Ward. The only case involving a dial-a-porn company that was actually considered by a court resulted in a dismissal of the action. That was our first attempt.

We made another try and obtained a settlement by negotiating a plea agreement which resulted in payment by the company in question of a $100,000 fine and a cessation of business; that is closure of 38 dial-a-porn lines in 12 cities across the country.

I am frank to say, Mr. Chairman, that the only reason we were able to reach a negotiated settlement in that case was because the owner of the companies in question, located in Los Angeles, CA, did not want to endure the negative publicity of a prosecution. Had we had to go to trial, we would have encountered the difficulties that existed under prior law, which were a formidable deterrent to U.S. attorneys in their efforts to counteract dial-a-porn.

Senator DeConcini. So there is quite a deterrent for U.S. attorneys to proceed today based on existing law.

Mr. Ward. Absolutely, yes. Helms-Bliley will help, especially if obscene dial-a-porn is made a felony offense.

Senator DeConcini. I would like to ask both of you to comment. Opponents of S. 2033 have argued that if this were to become law, there would be a national standard for obscenity. They suggest that the most conservative view to be judicially upheld would prevail across the country.

How do each of you respond to that? In your opinion, does this set any national standard for obscenity?

Mr. Showers. I think as the chairman said earlier, and as Senator Thurmond said, this does not change the definition of obscenity.

Senator DeConcini. Right. So we are not talking about a court having to determine a standard of obscenity.

Mr. Showers. No. That is correct. Again, each jury in each community where it is prosecuted will determine under *Miller* v. *California* as it presently exists.

Senator DeConcini. Just the way the law is now.

Mr. Showers. That is correct.

Mr. Ward. The local community standard will prevail in each case.

Senator DeConcini. And under the language of this bill, would there be any possibility of forum-shopping by the prosecutor, in your opinion, Mr. Ward or Mr. Showers?

Mr. Ward. There is no doubt, Mr. Chairman, particularly if multiple prosecutions are to be brought, that some process of selection would have to be engaged in.

Senator DeConcini. I mean, is it likely that the U.S. attorneys would get together and say, well, let us go bring this case—assuming it is interstate and would fall within the purview, let us bring it in Utah or Arizona because they have a little more conservative approach, or let us bring it in some other State?

Mr. **Ward**. Yes. I am frank to say that it is not only possible, but it is about to happen. Several U.S. attorneys expressing an interest in the same targets, if you will, are going to be indicting the same company in their districts at about the same time. That is part of our current strategy in this area, Mr. Chairman.

Senator **DeConcini**. Do you care to respond to that, Mr. Showers?

Mr. **Showers**. Just one comment, Mr. Chairman. That is, that obscenity distribution is sort of a unique crime in this respect. It may be the only Federal crime—certainly one of the few—that is committed by one target or one distributor in probably all 93 Federal districts. So when you say forum-shopping, there are 93 Federal districts that they have a crime involvement that could prosecute. It is a very unique crime in that respect, where even the largest drug cartel would not commit crimes in more than maybe 15 or 20 Federal districts.

Senator **DeConcini**. That is a good point.

How do each of you respond to the opponents of the obscenity portion of this legislation who state that it would result in a chilling effect on the magazine and book distribution industry because it makes it a crime to receive or sell any obscene material? In your judgment, have you thought about consequences of placing that burden on legitimate business people who sell magazines and books and do not read them all? Obviously, some of them are very obviously pornographic. But what about those that might not meet——

Mr. **Ward**. The distribution of these obscene materials has been illegal for a long time. That is a burden or a task or a duty that has been on the shoulders of distributors all along. I am not sure that this adds anything to the existing duty and burden that they have.

I might add that the *Miller* v. *California* test is not that difficult to discern and ascertain. It merely says that that which is without value which is bought and sold strictly to take advantage of and exploit human weakness, you might say, is obscene. So I think that it does not add to the existing burden that is on the shoulders of distributors to determine what is and what is not obscene under the *Miller* v. *California* test.

Senator **DeConcini**. Mr. Showers?

Mr. **Showers**. I would make two brief comments. The first is very much what Mr. Ward said, and that is, that the definition is clear. In fact, it is so clear that juries have had no trouble in finding the materials obscene. In fact, book sellers and people even dealing in pornography material know what is illegal pornography and what is not. "Playboy," for example, takes very great precautions, and they know where the line is. In fact, that is why "Playboy" has never been found to be illegal and other magazines certainly have. They know where that line is.

Second, the courts have addressed this question; in fact the highest court, the Supreme Court. The same argument was made to the court that this is somehow going to provide some type of self-censorship, the obscenity laws. And the U.S. Supreme Court has said: Not at all, the definition is clear; and any kind of self-censorship that occurs is simply because they are dealing in risky and perhaps illegal material, and is certainly not unconstitutional. The court has addressed that very question.

Senator DeConcini. What did the court determine?

Mr. Showers. That it was not unconstitutional, any kind of self-censorship that is dealing in that risky area where the illegal material is involved.

Senator DeConcini. The concern will be argued here, regarding the supermarkets or the large stores who receive a great volume of magazines, like Glamour, Cosmopolitan or what have you. What if one issue of these magazines judged by a local community standard is deemed obscene because of the contents of some editorial or advertisement that is in it?

Number one, do you think it is possible? And under the forfeiture provisions of this bill, would the supermarket be liable? And what assets, in your opinions, could be seized under this bill if, in fact, they were liable? Mr. Showers?

Mr. Showers. First, again, the purpose of the forfeiture provisions are squarely against organized crime and squarely against interstate and international traffickers in it. The Federal interest is in the interstate and international distributors and producers of obscenity, not the retailers which are for the State interest.

Second is that clearly it has to meet the obscenity definition which, as you know, is a very hard-core pornography definition. But if, in fact, there was hard-core pornography, illegal obscenity being sold, then the obscenity forfeiture provision would go to anything that would facilitate that kind of sale, similar to the drug trafficking laws. This forfeiture statute is almost identical to the drug forfeiture statute. So if drugs were being sold in that supermarket, the same kind of forfeiture would apply as it would in the obscenity area.

Senator DeConcini. So it would put the burden on the store to be sure that the magazines there did not go past that line that you have indicated some magazines have very carefully adhered to?

Mr. Showers. Again, yes, that it was not hard-core pornography. And most of the supermarkets certainly are not dealing with that.

Senator DeConcini. Of course not.

Mr. Showers. It is certainly dealt with in pornographic outlets.

Senator DeConcini. Mr. Ward.

Mr. Ward. Mr. Chairman, I might add that many criminal laws can be taken to an absurd extreme, and I would view this as an absurd extreme under this law. I cannot imagine——

Senator DeConcini. Well, what would you do as a U.S. attorney if the large supermarket in Salt Lake City had some pornographic material there and somebody brought you copies and you had the proper investigation to know that actually it was there and you know that it was put there under the management of the store, but you have no evidence that anybody had read it or knew that it was in the contents of the material, but there is no question? What would you do with that kind of a hypothetical?

Mr. Ward. That would, in my mind, be such a clear example of a simple mistake, Mr. Chairman, that there would be other means to take care of it. In fact, people, citizens have brought to me in the past examples of that, of material which they considered to be obscene which they found in a supermarket. Once that was brought to the attention of the manager of the store, the material was removed and it did not happen again.

Senator DeConcini. I guess you are saying there is always a certain discretion within a prosecutor.

Mr. Ward. Absolutely, yes.

Senator DeConcini. You would hope that good judgment would prevail.

Mr. Ward. That is right. That is the case with many criminal laws.

Senator DeConcini. If good judgment on the retailer did not prevail, under the forfeiture clause provisions in this bill what do you think could happen? Could they lose everything in the store? What would be subject to forfeiture as it relates to a huge supermarket? Have you thought about that?

Mr. Ward. I have thought some about it. As I say, it is such an extreme situation. I think it is so unlikely to occur that it has not occupied my thoughts to any great extent. But I think that theoretically, whatever was used to facilitate the sale of the item which was found to be obscene——

Senator DeConcini. In other words, everything in the store would not be subject to——

Mr. Ward. I would not think everything in the store. Whatever is used to facilitate the sale of that particular item could be, theoretically, forfeited.

Senator DeConcini. You would not go after the Haagen-Dazs ice cream or anything like that?

Mr. Ward. No. And I think even in a closer case, where you are talking about a magazine distributor, not a retailer but a wholesaler who has a warehouse full of all kinds of magazines, I would not think the other kinds of magazines would be forfeitable.

Senator DeConcini. What about their equipment?

Mr. Ward. It is very possible the warehouse itself and the land on which it is situated could be forfeited, but not the rest of the stock of the distributor.

Senator DeConcini. Thank you very much, gentlemen. I have a number of questions that I am going to ask you to take the time to respond to us. It would be very helpful. Just due to time and the panels following you, we will not be able to ask any more.

[The questions to Messrs. Showers and Ward follow:]

## QUESTIONS BY SENATOR HATCH FOR H. ROBERT SHOWERS

1. Those who oppose this legislation often stress that obscenity laws involve victimless crimes. The Justice Department testimony notes that recent studies reveal a correlation between pornography and rape and child molestation. Do you believe that bills such as the Child Protection and Obscenity Enforcement Act involve regulation and prosecution of victimless crimes?

## ANSWER TO SENATOR HATCH

1. Obscenity and child pornography are not victimless crimes. The Attorney General's Commission on Pornography received testimony from thirty witnesses who reported that they or others with whom they had special relationships had been harmed in some manner by or as a result of pornography. Witnesses reported being coerced into pornographic performances, bound and beaten in direct imitation of pornography, and forcibly imprisoned for the purpose of manufacturing pornography. Others told of being shown pornography as children as part of the sexual seduction process and then being coerced into sexual acts. You are referred to Part Four of the *Final Report, Attorney General's Commission on Pornography* for further discussion on victimization.

Many of the performers in pornographic films report being runaways, and then throwaways as child prostitutes slowly descending into the world of pornography where self-esteem and dignity have long since lost their meaning. Obscenity is sexual exploitation, prostitution and rape in pictures and in progress - in other words crimes in process with many direct and indirect victims. Child pornography is simply a permanent record of child sexual abuse which claims hundreds of thousands of child victims each year.

## QUESTIONS BY SENATOR HATCH FOR H. ROBERT SHOWERS

2. It is my understanding that the kind of material labeled "hard core pornography" has changed in recent years and is much more violent and depraved than mere pictorial depiction of nude figures. What kind of material are we talking about when we use the words "hard core pornography?"

## ANSWERS TO SENATOR HATCH

2. The United States Supreme Court uses the word "obscenity" to describe hard core pornography. In Miller v. California, 412 U.S. 15 (1973) the Court established a three part test to determine whether something is obscene:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra. at 230, quoting Roth v. United States, supra at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court provided a few examples of what may be found obscene:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Note that as an attachment to my testimony I included two pages from United States v. Pryba, 678 F.Supp. 1225 (E.D. Va.) which we recently prosecuted. All of the charged materials which we believed were obscenity are described in the pages. The jury agreed as to most of these materials.

A recent Harvard Medical School study of pornography's content, conducted by Park Elliott Dietz, M.D.,M.P.H., Ph.D., concluded that the vast majority of hard core pornography on the market today was virtually unavailable just 15 years ago. The study concluded that the primary sexual conduct depicted as "hard core pornography" in 1970 was a nude posing alone. Today hard core pornography, not as a legal term, but in street terminology, shows sexual conduct involving penetration or deviant behavior such as ejaculation, bondage, torture, excretory functions, incest, rape, beastiality, etc. The primary depiction of the 1980's according to the study is vaginal, anal or oral intercourse between numerous individuals of the same or different sexes usually with violence of some type permeating the sexual conduct depicted.

## QUESTIONS BY SENATOR HATCH FOR H. ROBERT SHOWERS

3. To what extent is organized crime involved with the production and sale of pornography?

ANSWERS TO SENATOR HATCH

3. The Final Report of the Attorney General's Commission on Pornography makes the following conclusion regarding the extent of organized crime involvement in pornography:

"In conclusion, organized crime involvement in pornography.....is indeed significant, and there is an obvious national control directly, and indirectly by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime. Only through a well coordinated all out national effort, from the investigative and prosecutive forces can we ever hope to stem the tide of pornography. More importantly, the huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as narcotics and investment in legitimate business enterprises, are certainly cause for national concern, even if there is a community apathy toward pornography."

The 1987 California Report on Organized Crime estimated that nationwide revenues from illegal pornography range from $7 - 10 billion annually, and organized crime is believed to be connected to most of the money. According to Daryl F. Gates, Chief of Los Angeles Police Department, who testified before the national 1986 commission on pornography, "organized crime infiltrated the pornography industry in Los Angeles in 1969 due to its lucrative financial benefits

By 1975, organized crime controlled eighty percent (80%) of the industry and it is estimated that this figure is between eighty-five to ninety percent (85-90%) today. For a more detailed account of organized crime's control over the illegal pornography industry see the Attorney General's Commission on Pornography, July 1986, at 291-298, 1037-1212 and Senator Jess Helms' statement when obscenity was added to the RICO law at Cong. Rec. S433-458 (daily edition, January 30, 1984).

## QUESTIONS BY SENATOR HATCH FOR H. ROBERT SHOWERS

4. Some are criticizing the obscenity provisions of this bill as being violative of First Amendment guarantees. How do you respond to these allegations?

## ANSWERS TO SENATOR HATCH

4. We can say categorically that no provision in this bill violates the First Amendment. Certain organizations continue to believe that obscenity and child pornography should be protected by the First Amendment and thus, when their spokespersons refer to the "first amendment" they refer to a broader concept than has ever been recognized by the United States Supreme Court, Congress, the Founding Fathers, or the public at large.

In conversations with opponents of the bill, most often the forfeiture provision, more than any other provision, is said to violate the First Amendment. I expanded the forfeiture portion of the testimony which I gave in the Senate Judiciary Committee for my testimony in the Crime Subcommittee of House Judiciary, which I attach here. As this expanded testimony indicates, the provision is not opposed to the Constitution and is a critical weapon if we are to protect our children, women and family life against the effects of obscenity and child pornography in our society.

## QUESTIONS BY SENATOR HUMPHREY

1. With respect to the child-selling provisions in Section 102, of S.2033, is there merit to the suggestion that these provisions should not be limited to the sale of minors for pornography purposes, but should apply to all such sales?

   a. Is it because these provisions also apply to the "transfer of custody or control" of minors, not merely to actual "sales", that makes it prudent to limit the provision to pornography-related transfers rather than applying the section to all such transfers?

   b. Or is the limitation of this provision to pornography-related cases based upon principles of federalism, inasmuch as the sale or improper transfer of custody of children for other purposes is adequately covered by state laws?

## ANSWERS TO SENATOR HUMPHREY

1. The child selling-for-pornography provision is essentially an aggravated kidnaping offense. Kidnaping is already a federal crime and its seriousness can be gauged by the fact that it is punishable by imprisonment for any term of years up to life. Kidnaping for the purpose of using a child in child pornography is so serious that the offense carries a mandatory minimum term of imprisonment of 20 years. We would prefer to see the child buying and selling provisions in the bill confined to this purpose, namely imposing a deservedly severe punishment for a particularly despicable form of kidnaping. Any attempt to cover child buying and selling generally raises difficult questions relating to the fees and expenses involved in child adoptions, a question which the Congress has considered in the past decade. While virtually all persons agree that out and out child buying or selling should be outlawed, there is considerably less agreement as to how to define such an offense without impairing what at least large segments of opinion regard as legitimate child placing services. We do not believe it is necessary to deal with this difficult issue to accomplish the purpose of the child buying and selling provision which is providing additional protection for minors who are transferred for the specific purpose of involvement in pornography, prostitution or for sexual purposes.

## QUESTION BY SENATOR HUMPHREY

2. Although I strongly disagree with the ACLU's overall position on S.2033, one of their comments concerning the provisions of Section 201 (receipt or possession of obscene matter) might raise a plausible issue. They suggest that possible overbreadth problems under Section 201 might be obviated by including a "commercial purpose" limitation with respect to certain violations based on receipt or possession with intent to distribute, or "offering for transfer."

a. Would the inclusion of a "commercial purpose limitation respecting such aspects of Section 201 undercut the purposes of the bill by providing a "safe harbor" for the transfer or distribution of obscene materials to children by pedophiles, for example, since a "commercial purpose" is irrelevant to the harm resulting from such transfers or distribution?

b. Do you foresee any realistic or practical prospect that non-commercial transfer or exchange of obscene materials between consenting adults, such as a gift of an obscene book from one adult to another, would be subject to unjust or unconstitutional prosecution under the existing language of section 201 of the bill?

## ANSWER TO QUESTION BY SENATOR HUMPHREY

2. As you know, section 201 of the bill makes it an offense to receive or possess with intent to distribute any obscene material which has been shipped or transported in interstate commerce. The punishment for this offense is two years' imprisonment and a felony level fine. However, section 201 also sets out a more aggravated offense of receiving or possession obscene matter with intent to distribute it while engaged in the business of selling or transferring obscene material. We do not agree that constitutional concerns necessitate scaling back this section so that it would cover only the latter offense, namely receipt or possession of obscene matter for purposes of commercial distribution. There is no constitutional right to receive or send obscene material through channels of interstate or foreign commerce. While the Supreme Court has recognized that the mere possession of obscene material in one's own home for one's own use mab be protected by the First Amendment, see *Stanley v. Georgia*, 394 U.S. 557 (1969), it has squarely rejected the idea that the right to possess such material in a home creates a correlative right to possess it elsewhere receive, transport, or distribute it. See *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971).

Although intended primarily for use against commercial distributors, the offense of receipt of possession of obscene matter for purposes of noncommercial distribution may prove useful in certain cases such as to obtain cooperation by an asserted "trader," "collector" or small time distributor of such material in building a case against a major supplier.

## QUESTIONS BY SENATOR CHARLES E. GRASSLEY

1. As you know, my bill, S.2021, differs somewhat from the President's bill, S.2033, introduced by Senators DeConcini and Thurmond, and of which I am an original co-sponsor.

I introduced my bill to concentrate on the issue of child pornography and how we might go about giving the victims of this pernicious activity some more protection.

Taking the differences between S. 2021 and S. 2033 in order, I would like to know what the Criminal Division's and the National Obscenity Enforcement Unit's comments are regarding the punishment provided for in Section 102 of both bills -- as you know, S. 2033 provides for a 20 year sentence for violating the prohibition against selling or buying of children, while S. 2021 makes the violation a class "A" felony (an offense against a person, with a sentencing range between life in prison and a term of years, depending upon where the particular violation falls within the guidelines of the Sentencing Commission) -- will you comment on why you believe one sentence is preferable over another?

If the constitutionality of the guidelines is upheld, should we not use them, or what public policy is served by carving out a specific sentence for this particular crime?

Could a judge circumvent the public policy you just spoke of and hand down a sentence of less than 20 years?

Would not the sentencing guideline provide for more consistency at the federal level in the sentencing of those convicted of this offense?

## ANSWERS OF H. ROBERT SHOWERS TO SENATOR GRASSLEY

1. Both S. 2033, the Administration's bill, and S. 2021, introduced by Senator Grassley proscribe the buying and selling of children. The Administration's bill provides for a mandatory minimum punishment of at least 20 years' imprisonment and the punishment may be for up to life imprisonment. Senator Grassley's bill makes the offense a Class A felony, which he describes as "an offense against the person with a sentencing range between life imprisonment and a term of years, depending upon where the particular violation falls within the guidelines of the Sentencing Commission."

As for which sentence is preferable, the Department of Justice has generally opposed mandatory minimum sentences as inconsistent with the guideline sentencing system which we strongly support. However, exceptions have been made in the area of drugs and we felt that an exception was appropriate for this particularly despicable offense which is in essence a kidnapping for the purpose of making child pornography. Moreover, a sentence such as that contemplated in the Department's bill is not entirely inconsistent with a guideline sentencing system since, if this provision is enacted, the Sentencing Commission could set sentencing ranges of between 20 years and life imprisonment for persons convicted. In short, we believe that the offense of child buying or selling for the purposes of making child pornography is so heinous, and persons who commit it are such a threat to the lives and safety of children, that public policy requires that the Sentencing Commission set sentences for an offender, regardless of his past record and role in the particular offense, at a minimum of twenty years' imprisonment. Under the Department's bill, the judge could not circumvent this public policy and hand down a sentence of less than twenty years.

Whether the sentencing guideline would provide for more consistency in sentencing for this offense than the twenty years to life provided for in the the Department's bill would depend on offense level and criminal history category assigned to the offense by the Sentencing Commission. Although S. 2021 makes the offense a Class A felony, this merely means that a life sentence or a sentence for any term of years is authorized. See 18 U.S.C. 3581(b). We are not certain which offense level the Sentencing Commission would assign to this offense but we would hope it would be at least level 38 which, even for offenders with the least aggravated criminal history, would mandate a sentence of between 235 and 293 months. That would bring the sentence very close to the twenty years we believe is deserved in all cases for this offense.

In this connection, it might be noted that the Commission assigned a base offense level of 25 for sexually exploiting a minor by production of sexually explicit visual or printed material in violation of 18 U.S.C. 2251, although the base offense level is increased to 27 if the minor is under the age of twelve. Moreover, the guidelines provide for further increases in offense level based on such things as abuse of a position of trust -- a factor that might well be present in a child buying or selling case if the defendant was the child's baby sitter or otherwise had temporary custody or control of the child -- and whether or not the defendant was an organizer or leader of the criminal activity. For a violation of 18 U.S.C. 2251 involving a child under twelve years of age by someone who occupied a position of trust and who also was an organizer or leader of criminal activity involving five or more participants -- a child buying ring, for example -- the offense level would be 33 under the current guidelines, assuming no mitigating factors. For an offender with the least aggravated criminal history, a sentence of between 135 and 168 months would be mandated. For defendants with the worst criminal history, a sentence of between 235 and 293 months would be mandated.

## QUESTIONS BY SENATOR CHARLES E. GRASSLEY

2. Now I would like to turn to Section 103 of both bills, regarding record keeping requirements. As you know, S. 2033 would require records of those who produce sexually explicit material going back 25 years, while the requirement in S. 2021 takes effect, generally, 180 days after enactment of the bill. Would you discuss the merits of record keeping in general -- in other words, why you believe that it is essential for enforcement against producers of pornography?

## ANSWERS BY H. ROBERT SHOWERS TO SENATOR GRASSLEY

2. There are numerous examples of the use of children in the production of pornography. Proof that an older-looking adolescent engaging in sexually explicit conduct is actually less than 18 at the time of filming is often impossible. As a result, cases involving the use of older adolescents in pornographic material are difficult to prosecute. Often they are not prosecuted. We believe that a requirement that records be kept would cause those involved in the production of pornography to be cautious in avoiding the use of children. For a more detailed information about the use of minors in pornographic depictions and films see the Final Report Attorney General's Commission on Pornography, July 1986, at 618-623.

## QUESTION ASKED BY SENATOR GRASSLEY

3. Can you expand upon the constitutional arguments against the record keeping requirement in S. 2033 and explain why you believe that this section will withstand constitutional scrutiny?

ANSWERS BY H. ROBERT SHOWERS TO SENATOR GRASSLEY

3. We have taken considerable care to draft the record keeping provision in the new 18 U.S.C. 2257 with constitutional constraints firmly in mind. For example, the proposed 18 U.S.C. 2257(d) provides that no information or evidence obtained from the records shall, with certain exceptions, be used as evidence against a person with respect to any violation of law.

The basic prohibition on the use of information in the records themselves in prosecutions of child pornography and obscenity cases is constitutionally required and is derived from 26 U.S.C. 5848 which places similar restrictions on the evidentiary use of information contained in firearms registration records. In United States v. Freed, 401 U.S. 601 (1971) the Supreme Court upheld the regulatory scheme involved against a claim that requiring the information violated the Self-Incrimination Clause of the Fifth Amendment, noting that under 26 U.S.C. 5848 the use of information in the registration records was severely limited. Section 401 U.S. at 605-606. In other cases, however, where the use of information required from a group of persons highly suspect of criminal activities has not been so limited, the Supreme Court has found that requiring the submission of the information violated the person's privilege against self incriminalization under the Fifth Amendment. See Marchetti v. United States, 390 U.S. 39 (1968) and Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). Subsection 2257(d) is thus constitutionally required to sustain the validity of the record keeping requirements.

## QUESTIONS TO H. ROBERT SHOWERS BY SENATOR GRASSLEY

4. Would you comment on the prospective application of the record keeping requirement in S. 2021?

## ANSWERS BY H. ROBERT SHOWERS TO SENATOR GRASSLEY

4. The net effect of the record keeping section of the bill is that, after they become effective, in cases where the producer of pornographic material wishes to use visual depictions of actual sexually explicit conduct that were originally taken in the past -- for example, if the producer is approached by a performer or, more likely, by a third party who has obtained copies of the pictures or film strip in question and given a chance to buy the pictures or the negatives -- the producer must locate the performer and comply with all the record examining and keeping provisions of the section. If the producer cannot locate the performer he can use the picture without complying with the record keeping requirements only if the producer can show that the picture in question is more than 25 years old.

Taken together, the 25 year provision and the effective date provisions will work as follows: During the first 90 days after enactment the Attorney General will prepare regulations as to how producers of material depicting actual sexually explicit conduct are to keep and maintain the records, and any other regulations required or authorized by section 2257. During this period, and for the remainder of the first 180 days after enactment, producers do not have to comply with the provisions of section 2257. Beginning 180 days after the date of enactment producers have to comply with all the provisions of 2257 except for the requirement of subsection 2257(e) that they affix with the statement concerning the records' location. This will allow producers approximately three months to produce new material while complying with the record keeping provisions of section 2257 because, beginning 270 days after the date of enactment, the statement affixing provisions in subsection 2257(e) will become effective. This will mean that, beginning 270 days after the date of enactment, producers of magazines, films, and videotapes depicting actual sexually explicit conduct may only make such material if they can show that they complied with the record keeping requirements and indicate on the material where the records may be found. Even if the material was originally made (i.e. if the pictures had been taken) during the 270 day period or even before the date of enactment, producers cannot assemble the pictures into a film or magazine unless they have located the performers and complied with the record keeping requirements.

## QUESTION TO H. ROBERT SHOWERS FROM SENATOR GRASSLEY

5. Finally, as you know, both bills allow for a child who is the victim of sexual exploitation to sue his or her victimizer under the civil RICO statute and potentially recover actual plus twice punitive damages.

Would you the give the Unit's and Criminal Division's comments on Section 104 in my bill, S. 2021? As you know, this provision allows for child victims of not only sexual exploitation, but also juvenile prostitution, to sue in federal court for treble damages, instead of the present actual damages. Do you see any problem with providing child victims with this leverage -- as an alternative to the potential recovery under civil RICO -- over pornographers, pedophiles, and others?

## ANSWER BY H. ROBERT SHOWERS TO SENATOR GRASSLEY

5. Section 104 of S. 2021 is an excellent suggestion and the Department of Justice supports it.

## QUESTION OF SENATOR DECONCINI TO H. ROBERT SHOWERS

1. Gentlemen, I would like your opinion of the following statement: "[n]either the findings of the Attorney General's Commission on Pornography nor any other events have provided a basis for concluding that pornography is a serious national problem or that new laws are needed at the federal level."

This is a statement taken from the written testimony of the ACLU.

ANSWER BY H. ROBERT SHOWERS TO SENATOR DECONCINI

1. The premise is disputed by a variety of Commission findings, two of which I wish to cite here:

The Attorney General's Commission found that "organized crime involvement in pornography ... is ... significant, and there is an obvious national control directly, and indirectly by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime." Perhaps the ACLU does not consider it a "serious" problem that the enormous profits generated by obscenity (by one estimate 7 to 10 billion dollars a year) are fueling organized crime activities in America but the Department of Justice certainly does.

The Commission also found that "(i)n addition to the myriad of other harms and anti-social effects brought about by obscenity there is a link between traditional organized crime group involvement in the obscenity business and many other types of criminal activity. Physical violence, injury, prostitution and other forms of sexual abuse are so interlinked in many cases as to be almost inseparable except according to statutory definitions." The Commission went on to document some of the crimes that are linked to the obscenity industry, including murder, narcotics distribution, money laundering, tax violations, copyright violations, and fraud.

Additionally, in my testimony before your Committee I cited many studies that indicate that pornography causes harm. Thus the statement of the ACLU is not supported by the Commission findings and it is refuted by a substantial number of studies.

Also, I would suggest that the recent, much publicized death by AIDS of the pornography's most celebrated male "star," John Holmes, and his wife's statements that AIDs is rampant among pornography performers indicates that pornography is a serious problem for its participants as well as its consumers.

## QUESTION BY SENATOR DECONCINI

2. What about the case of magazine distributors who know in advance the title of magazines and books that they receive, but do not know the content of them? The distributors then distribute to the retailer materials which, because of varying community standards, are later found to be obscene. Does this create a liability on the part of the distributor? If so, what assets would be liable to forfeiture?

ANSWER TO SENATOR DECONCINI

2. One of the criticisms of the bill that has been raised is that it will subject purveyors of pornographic material such as magazines to different community standards regarding what is obscene. The simple answer is that the definition of obscenity itself, as set out by the Supreme Court more than a decade ago, recognizes that material that is considered obscene in one area may not be in another. Moreover, present law (18 U.S.C. 1465) proscribes the transportation in interstate commerce for the purposes of sale of any obscene matter. This offense may be prosecuted in any district from, through, or to which such material is sent. See 18 U.S.C. 3237. Consequently, persons who transport obscene material may, under existing law, be prosecuted even though the state of prosecution may have a different standard for what is obscene than the state in which the transporter lives or does business. The only change wrought by section 201 of this bill, which adds a new 18 U.S.C. 1466 and also extends the coverage of section 1465, is to expand the class of persons liable for prosecution for trafficking in obscenity. Persons who transport obscene matter across state lines for purposes of sale are already liable under current law. Persons who distribute obscenity which has been transported in interstate commerce but do not actually carry it across state lines themselves would be liable under the new 1466.

To elaborate on the above, in Miller v. California, 413 U.S. 15, 24 (1973) the Supreme Court stated what is the accepted test for obscenity. To be proscribed as obscene it must be established that (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable statute; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The opinion makes it very clear that community, not national, standards are to be applied in the first prong of the Miller test. See Miller, pp. 31-32. As discussed, section 201 of the bill adds a new section 1466 to title 18 to proscribe the possession or receipt with intent to distribute of obscene matter which has been shipped or transported in interstate commerce. Nothing in this new section, or for that matter in any other part of the bill changes the Miller definition of obscenity.

What the new section 1466 would do is permit the prosecution of a magazine distributor in State X, who has received his materials from State Y. In this case, however, venue would be in State X -- the State in which he received or possessed the magazines -- and the standard for obscenity in State X would be applied. The standard in State Y would not be relevant. If the distributor then transported material into State Z, he could be prosecuted in either State X or Z and the obscenity standard for the state in which he is prosecuted would apply. In this case, however, prosecution would be under the existing section 1465 and the new statute does not create any new liability on the part of the distributor.

Subsection 201 (c) of the new statute, however, expands the scope of section 1465 to cover the use of a means or facility of commerce for interstate trafficking in obscenity. A facility of commerce would include the federal highway system while a means of commerce would include all types of conveyances capable of carrying goods in interstate commerce. To continue the above hypothetical, if the distributor in State X caused a truck containing obscene material to move along an interstate highway within State X for the purpose of selling the material at a different location within State X, he could be prosecuted under the revised section 1465. In this case State X's community standard for obscenity would be the only one applicable.

## QUESTION BY SENATOR DENNIS DECONCINI

3. Grave concerns have been expressed by many of the publishers, distributors, and sellers of legitimate periodicals. They fear the very survival of their businesses; worrying that the forfeiture provisions will result in confiscation of all their assets if they are found to have handled one obscene periodical.

My question is this: if a merchant is found to have received or have possession of a single item declared obscene, would he be prosecuted and subject to the forfeiture provisions of S. 2033? Would this hypothetical merchant lose part of his inventory or the whole store by forfeiture? Would this type of possible defendant be a likely candidate for a prison term? If the merchant sold two or more copies of the obscene publication would he then be sentenced to a five year term?

## ANSWER TO SENATOR DECONCINI

3. It is important at the outset to understand just what articles would be subject to criminal and civil forfeiture if the new obscenity forfeiture provisions were enacted. The bill adds a new section 1467 to title 18 of the United States Code. It provides that anyone convicted of an offense involving obscene material under Chapter 71 (the obscenity chapter) shall forfeit his or her interest in any obscene material involved in the case, any property traceable to the proceeds obtained from the offense and any real or personal property intended to be used to commit or promote the commission of such offense.

Thus, this section would allow the forfeiture of any obscene material such as magazines or videotapes that the defendant was convicted of selling. It would allow the forfeiture of property traceable to the proceeds of the sale. For example, if it was shown that the obscene materials were sold for $1,000 and the $1,000 was deposited in a bank account with proceeds from the sale of other, non-obscene material, $1,000 could be forfeited from the bank account. Finally, the provision allowing the forfeiture of property used to commit or promote the commission of the offense would allow the forfeiture of such things as the shelves from which the obscene material was sold and the book store owner's interest in the land on which the store was located, for example his equity in the property or his leasehold interest.

This provision would not, however, allow the forfeiting of the entire business or of materials not involved in the criminal case, obscene or non-obscene, as some opponents of the bill are apparently alleging. Some of the confusion in this area may arise from the publicity given to the forfeiture involved in the recent Pryba case in the Eastern District of Virginia. Pryba involved a conviction under the RICO statute, 18 U.S.C. 1962. That statute makes it an offense to receive income from a pattern of racketeering activity. A pattern or racketeering activity is defined as at least two acts of racketeering activity. Racketeering activity includes many types of crimes, including trafficking in obscene matter. The defendants in Pryba were convicted of selling obscene video tapes and magazines on several different occasions. Testimony from accountants demonstrated that the money was then invested back in the business enterprise. The RICO penalty section, 18 U.S.C. 1963, authorizes the forfeiture, on conviction, of any interest in any enterprise the person has established or operated in violation of section 1962. The jury found that the defendants' video stores (the enterprise) were operated in violation of section 1962, namely that they were used to sell obscene material. Consequently, the interest in the video stores, essentially the defendant' shares of stock in the various controlling corporations, was forfeited. Since the corporations' assets included the video stores and the warehouse and the material offered for sale or rental therein, the entire inventory, including the inventory of non-obscene as well as obscene videotapes was ordered forfeited.

RICO forfeiture is purposefully very harsh and is designed to reach the entire enterprise. By contrast, the broadest aspect of the obscenity forfeiture provisions, which allow the forfeiture of property used to commit or promote the offense, is still not as broad as the RICO forfeiture provisions and would not allow the forfeiting of all the inventory.

With respect to the civil forfeiture provisions, which would be included in a new section 14689 of title 18, they allow the forfeiture of the same things as does the criminal forfeiture provision, namely the obscene material itself, real or personal property used or intended to be used to commit or promote the commission of an offense involving obscene material, and real or personal property constitution or traceable to gross profits or proceeds obtained from a violation of one of the obscenity offenses in Chapter 71. The difference, of course, between criminal and civil forfeiture is that the latter is not dependent on a criminal conviction. Civil forfeiture would, for example, allow the forfeiture of all obscene magazines or videotapes offered for sale in violation of the new section 1466, a section that would make it an offense to receive or possess with intent to sell obscene material which has been shipped or transported in interstate or foreign commerce. It would allow the forfeiture of any profits or proceeds traceable to the sale of obscene material, although in the case of a bookstore offering both obscene and non-obscene materials, tracing the proceeds attributable to obscene material would often present difficult proof problems. Finally, the civil forfeiture provision would allow the forfeiture of things such as the shelves in the store or the store owner's interest in the land on which the store was located since these things would constitute property used to promote the commission of the offense. As with the criminal forfeiture provisions, the civil provisions would not allow the forfeiting of the entire stock in a business, unless every single article offered for sale was found to be obscene, a most unlikely situation.

Whether a merchant who sold a single obscene article would be a candidate for a prison term would, of course depend on a number of considerations including the nature of the article, the past record of the merchant, the type of business involved, and a number of other factors. In this connection, it is the policy of the Department of Justice to concentrate our prosecutive efforts on large scale distributors of hard-core pornography. At the June 8, 1988 hearing, the question was raised whether a grocery store that sold a single copy of Cosmopolitan that was found to be obscene would lose its entire inventory. Initially it is inconceivable that this publication, at least as we understand its present contents, would ever be prosecuted as obscene by a federal prosecutor. Even if a grocery store sold one magazine that was found to be obscene, we are unaware of any chain of grocery stores that can remotely be characterized as distributors of hard-core pornography. As indicated, such a store would be well down our list of prosecutive priorities. Finally, as the above discussion of the forfeiture provisions indicates, prosecution for selling one obscene article would not subject to forfeiture the non-obscene articles such as potatoes, boxes of cereal, laundry detergent, and copies of the National Enquirer.

Finally, the new 18 U.S.C. 1466 does make it an offense punishable by imprisonment for up to five years to receive or possess with intent to sell any obscene article that has moved in interstate or foreign commerce if one is "engaged in the business" of selling or transferring obscene matter. It further provides that the offering for sale at one time of two or more copies of an obscene publication shall raise a presumption provision is derived from a similar presumption in existing section 1465 which has been judicially upheld. See United States v. Manarite, 448 F.2d 583 (2nd Cir.), cert. denied, 404 U.S. 947 (1971). Whether a merchant who sold two or more copies of an obscene publication would be prosecuted under this provision, and whether he or she would then be sentenced to the maximum term of imprisonment if convicted would, of course, depend on all the facts and circumstances.

## QUESTIONS FROM SENATOR HATCH TO UNITED STATES ATTORNEY BRENT WARD

1. It is my understanding that while our previous legislative efforts to deal with child pornography have been fairly successful in putting an end to the regular monthly publications that appeared on some news stands, the supply of these materials for an ever increasing market has shifted to a well-organized network of child molesters and pedophiles who simply make their own recordings or photographs and share them between themselves. Is this in fact the case, and if so, how will this legislation help to combat this problem?

## RESPONSE TO SENATOR HATCH FROM U.S. ATTORNEY WARD

1. Your understanding is correct. One way this underground child pornography market operates is by the exchange of information and even pornographic material itself via computer. Section 101 of the legislation will be helpful in this regard. It would outlaw for the first time the use of computer communications to exchange child pornography or certain information related to child pornography. Also, Section 104, which adds child pornography as a predicate offense for prosecutions under the RICO statute, will add to our arsenal of weapons to be used against major offenders.

## QUESTIONS FROM SENATOR HATCH TO UNITED STATES ATTORNEY BREND WARD

2. There are several proposals for dealing with pornography and obscenity and their victims and the bills before use today. What more might you suggest in attacking this menace to society?

## ANSWERS TO SENATOR HATCH FROM U.S. ATTORNEY BREND WARD

2. I have two suggestions. First, adequate funding for obscenity investigations and prosecutions must be assured. This might be done by funding the National Obscenity Enforcement Unit in the Criminal Division of the Department of Justice as a separate line item and doing the equivalent with respect to the FBI budget. Second, as I suggested in my oral statement to the Committee, the transmission of obscene dial-a-porn by means of interstate telephone communications should be made a felony, rather than a misdemeanor.

## QUESTIONS FROM SENATOR DECONCINI TO UNITED STATES ATTORNEY WARD

1. Under Section 202 dealing with forfeiture, what sort of assets of a video dealer would be forfeited if the dealer had only a few "obscene" tapes available to the public? Would the entire store be forfeited? Would all the property in the store purchased after the first rental of the obscene video be seized under the theory that the rental proceeds went toward purchasing additional inventory? What role does the Court's discretion and the prosecutor's discretion play in this?

## ANSWER TO QUESTION FROM SENATOR DECONCINI BY U.S. ATTORNEY WARD

1. The same question arises with respect to existing forfeiture and racketeering statutes. The answer is that while these statutes in theory authorize seizures such as those you have described when taken to the extreme, in actual practice the statutes are not enforced in that manner. The judgment of U.S. Attorneys, together with appropriate checks provided under Department of Justice policy, prevent extreme applications of seizure and forfeiture laws. In my judgment, therefore, Section 202 would not permit the forfeiture of an entire store or all of the property in the store under the hypothetical referred to in your question.

   Unless the rental of obscene tapes constituted a substantial portion of the video dealer's business, it is unlikely that the forfeiture law would be used at all. On the other hand, if the rental and sale of obscene tapes is the sole business of the video dealer, I would expect the government to seek forfeiture of the premises and the owner's interest in the business as well.

   It must also be remembered that such forfeitures would require Court approval, which would be an additional check on the use of Section 202.

Senator DECONCINI. Thank you, gentlemen, very much.

Mr. SHOWERS. Thank you.

Mr. WARD. Thank you.

Senator DECONCINI. Our next witnesses will be Dr. Jerry Kirk, chairman, Religious Alliance Against Pornography, and president of the National Coalition Against Pornography; and Dr. Larry Braidfoot, general counsel of Christian Life Commission, Southern Baptist Convention.

Gentlemen, thank you for being with us. As I mentioned, due to time constraints we would put your full statements in the record and ask that you summarize them for us, if you will.

We will start with you, Dr. Kirk.

## STATEMENT OF PANEL CONSISTING OF DR. JERRY R. KIRK, CHAIRMAN, RELIGIOUS ALLIANCE AGAINST PORNOGRAPHY, AND PRESIDENT, NATIONAL COALITION AGAINST PORNOGRAPHY, CINCINNATI, OH; AND MR. LARRY BRAIDFOOT, GENERAL COUNSEL, CHRISTIAN LIFE COMMISSION, SOUTHERN BAPTIST CONVENTION, NASHVILLE, TN

Dr. KIRK. Thank you, Senator DeConcini. It is a privilege to be here, and we are grateful for the leadership you are giving to this bill, S. 2033.

My testimony to you and the Senate committee is essentially this: Opposition to the problem of obscenity has been mainstreamed. What may have at one time been a conservative issue is now a conservative, moderate and liberal issue for concerned citizens who care about what is happening to children and to family life.

What once was a religious issue is now a religious, moral and public safety issue. And what we are discovering all across America is that it is becoming primarily a public safety issue. As the head for the Centers for Disease Control in Atlanta said publicly, every sexually transmitted disease is now at epidemic proportions.

I bring you this testimony as president of the National Coalition Against Pornography and chairman of the Religious Alliance Against Pornography; and because other leaders of the Religious Alliance were not able to be here, I have been asked to bring a statement from them. This is signed by Cardinal Bernadin; by Bishop Bill Schrey of the Episcopal Church, Bill Melvin of the National Association of Evangelicals; Adrian Rogers, who heads the Southern Baptist Convention; George McKinney, bishop of Southern California and the Church of God in Christ; Rabbi Mordechai Waxman; Dr. Eileen Lindner of the National Council of Churches; and Archbishop Yakovos, who heads the Greek Orthodox Church.

The religious diversity of the Religious Alliance has come together to unite on this issue. This long and sometimes fractious history of religious groups makes it all the more noteworthy and remarkable that the Religious Alliance Against Pornography, including Roman Catholic, Protestant, Orthodox, Mormon and Jewish Leaders—and we have attached their names—has been established and has functioned for more than 2 years as a coalition of diverse religious bodies together determined to advocate for an end to illegal obscenity and child pornography through the enforcement of law.

We foresee the need for the governmental, private and public sectors to join together in an effort to educate the public to the destructive capacity of this pornography and to evermore fully resolve as a society to eliminate such materials from our common life. We are grateful that the Child Protection and Obscenity Enforcement Act of 1988 now before the Congress will significantly help accomplish that task, and we are grateful for your leadership in that.

A final quote from these leaders:

> The peoples of our religious communities represent a broad spectrum of American opinion which cannot be categorized theologically or politically as conservative or moderate or liberal. The resolve across that broad spectrum of opinion is to battle against such pornography and to support the Child Protection and Obscenity Enforcement Act of 1988.

In summary, these points—and my testimony includes them so I will not go into them at length—the issue of whether such pornography is harmful is no longer debatable for most people. The research is there, and I have alluded to that in my lengthy report. Pornography is a powerful educative tool like any form of written or visual media, and the imagery found in the majority of pornography produced in America is sexually violent and aberrant in nature, and I quote Dr. Deitz at length.

Pornography is addictive, and Dr. Victor Cline has done extensive research on that, and I have summarized that research.

Pornography is a contributing factor to rape. It has promoted the rape myth, and the rape rate has continually gone up with over 90,000 rapes reported last year. And I am here to say to you, I do not know whether you have ministered to a rape victim. We brought one into our home for 3½ years. It is a horrendous task to heal one rape victim. Pornography has been promoting the rape of women indiscriminately for decades.

Pornography is a contributing factor to the sexual molestation of children. Again, I have ministered to a 4-year-old little girl and her family, and I have seen what happens to a family when a child in that family has been molested.

The religious community has found unusual unity, as I have alluded to, but public opinion is clear through the Gallup pool: 76 percent of Americans believe violent pornography should be eliminated, and 92 percent believe that children involved sexually on videos ought to be eliminated.

I close with this paragraph. As our lawmakers, we know that you uphold the worth and dignity of each human being. I urge you to act swiftly and with wisdom on behalf of the American people to give our law enforcers the tools they need to finish the job against the criminal enterprise of obscenity. For us, we urge you to bring this matter before the full Senate and the House quickly. We have learned that the only way this kind of legislation can be defeated is by having it held within committee. Once the vote is on the floor and America can see how people vote, we know what happens. It happens every time.

So the thing we are here to urge is that you use your leadership to bring it before the Senate and allow them to debate it and to act upon it. We do thank for your support of this bill.

[The prepared statement of Dr. Kirk follows:]

Testimony of:

Dr. Jerry R. Kirk
Chairman, Religious Alliance Against Pornography
President, National Coalition Against Pornography

To:

Senate Committee on the Judiciary

Testifying in Support of:
Child Protection and Obscenity Enforcement Act of 1988

June 8, 1988

It is appropriate to thank you for the opportunity of testifying at this hearing. This hearing before the Senate Committee marks an important point in what has become a strong and vital movement across the United States in recent years. Obviously, the point of this hearing is to begin consideration of the Child Protection and Obscenity Enforcement Act of 1988, known as S 2033. The fact this hearing is taking place indicates that the federal Government has begun to hear the cries of victims, law enforcement officials and the majority of American citizens. Millions of Americans are all too familiar with the destructive influence of obscenity and we are grateful for the opportunity to help educate our federal leaders on this issue, so that you might take timely and decisive action.

What may have once been considered as an issue for conservatives only now has reached far beyond those bounds. As President of the National Coalition Against Pornography, a coalition of more than 70 business, civic, political and religious groups across America, and as the Chairman of the Religious Alliance Against Pornography, an alliance of the top religious leadership in America, including leaders from forty (40) denominations and religious organizations, our message to you today is that the issue of illegal pornography has been mainstreamed. It is an issue for conservatives, moderates and liberals. Even more than that, it is an issue of public safety. The impact of pornography in our nation is devastating. The proliferation of child molestation and the staggering increase of rape rates is in part due to the influence of pornography.

In the paragraphs that follow, I will outline for you not only how the issue of obscenity has been mainstreamed, but why.

## The Harm of Pornography

The question of whether pornography is harmful or not has, in most corners of the country, become a settled issue. People are no longer debating whether or not pornography is harmful. For the most part, the only people still debating this issue are the pornographers themselves who, of course, have the motive of guarding their means of profit. Study after study, including the Attorney General's Commission on Pornography of 1986, has concluded that there is a causal link between pornography and harm. The conclusions are strong. Pornography not only causes harm, but because the majority of pornography produced in this country is violent in nature, it leads not only to anti-social sexual activity, but also to unlawful sexual violence.

## Pornography Educates

Pornography is a powerful learning instrument. Untold Americans, most of whom are children, are learning about human sexuality from not only an inaccurate but an unhealthy source. Dr. Park Elliott Dietz, Professor of Law, Professor of Behavioral Medicine and Psychiatry, and Medical Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, addresses this issue:

> A person who learned about human sexuality in the "adults only" pornography outlets in America would be a person who had never conceived of a man and woman marrying or even falling in love before having intercourse, who had never conceived of tender foreplay, and who had never conceived of procreation as a purpose of sexual union. Instead, such a person would be one who had learned that sex at home meant sex with one's children, step-children, parents, step-parents, siblings, cousins, nephews, nieces, aunts, uncles and pets, and with neighbors, milkmen, plumbers, salesmen, burglars and peepers...who had learned that about one of about every five sexual encounters involves spanking, whipping, fighting, wrestling, tying, chaining, gagging or torture; who had learned that one in more than ten sexual acts involves a party of more than two; who had learned that the purpose of ejaculation is that of soiling the mouths, faces, breasts, abdomens, backs and food at which it is always aimed; who had learned that the anus is a genital that is to be licked and penetrated; who had learned that urine and excrements are erotic materials; who had learned that the instruments of sex are chemicals, handcuffs, gags, hoods, restraints, harnesses, police badges, knives, guns, whips, paddles, toilets, diapers and enema bags; who had learned that except for the children where secrecy is required, photographers and cameras were supposed to be present to capture the action so that it could be spread abroad.

Dr. Reo N. Christenson further addresses the issue. Dr. Christenson is a professor in the Department of Political Science at Miami University in Oxford, Ohio.

> Pornography leaves the impression with its views that sex has no relationship to privacy; that it is unrelated to love, commitment or marriage; that bizarre forms of sex are the most gratifying; that sex with animals has especially desirable flavor; and that irresponsible sex has no adverse consequences - no venereal disease, illegitimate births, abortions, premature marriages, single parent families or moral erosion. As has often been said, 'If destructive materials can do no harm then constructive material can do no good and everything conscientious parents have believed since the dawn of the family is wrong.' It is interesting that while a dozen studies have demonstrated that violent entertainment stimulates violent behavior on the part of those who witness it, entertainment which features irresponsible sexual behavior is alleged to have no effect on its consumers.

Dr. Christenson cites the highly significant study by Professor J. D. Unwin of Cambridge. Dr. Unwin actually found the opposite of what he had hoped to find.

Dr. Christenson cites:

> After examining the sexual practices of more than 80 primitive and more advanced societies, Unwin concluded that sexually permissive behavior led to less cultural energy, less creativity, less individualism, less mental development and less cultural progress in general. Primitive societies with the greatest sexual freedom have made the least cultural advances. Those with restrictive limitations have made the greatest progress. Among civilized societies, the same rule held. Those with restrictive sexual codes had made the greatest cultural strides and when more permissive sexual standards appeared, cultural decline set in. Unwin said, there was no known instance of a society that retained as high a cultural level after relatively relaxed sexual standards replaced more rigorous ones, although he conceded that it might take several generations before the debilitation effect was clearly manifest.

Dr. William Marshall, Psychologist at the Kingston Sexual Offenders Clinic in Ontario, Canada, works with child molesters and rapists and he, like Dr. Unwin, was surprised at what he found. It became obvious to Dr. Marshall that these molesters and rapists not only consumed more pornography than others, but that they seemed to consume more explicit forms of pornography. A number of these sexual offenders told him that pornography was instrumental in the commission of their crimes; that is, it played some part in initiating at least one or more of their offenses. Dr. Marshall says, "Sometimes they did it themselves deliberately; that is, in a sort of preparatory behavior if you like, to go out and molest a child or molest their own children or rape a woman, they would deliberately stimulate themselves with pornography." Dr. Marshall concludes, "If you wanted to produce a society and had some kind of malicious intent to produce a society that was going to have a higher rate of sexual offending, one of the things you would certainly want to do immediately, I think, is introduce pornography."

Is pornography a teacher? Yes.

Pornography is Addictive

For years now, psychologists have been discovering that pornography is addictive, much in the same way that gambling, drugs, and alcohol are addictive. Dr. Victor Cline, a psychologist at the University of Utah, has treated hundreds of men with pornography addiction. Dr. Cline's research has taught him that men who are heavily involved in pornography can go through four stages: the first stage is addiction. Dr. Cline says:

> When they get into it, they really get addicted to it and they go back to it again and again and again because they get their sexual highs from that. Then, it becomes very hard to escape from it. I find that it is a little bit analogous to a morphine or drug or alcohol addiction in that they have this very strong powerful need for it.

The second thing that happens is escalation. After awhile, the addict has to have rougher, more perverse, meaner kinds of pornography for sexual satisfaction. What was once stimulating no longer provides a sexual turn-on and so they "graduate" to a harder material.

The third thing that happens is desensitization. Dr. Cline says:

> That which was first inappropriate, immoral, improper, taboo-breaking, after awhile becomes acceptable. When you look at the stuff again and again and again, you get desensitized to it. You can see terrible things and no longer is your conscience seared or blunted. It gets turned off to the material. It says you can do these terrible things and in a sense, it becomes legitimized, it becomes okay.

In other words, the first time that a man sees a woman being raped on film, he may see it as disgusting and wrong. However, after he has been desensitized, he tends to see rape as much more normal and acceptable.

This final stage of progression, says Dr. Cline, is acting out.

> These people begin to act out some of the fantasies that they have

seen in film or magazines and when that happens, it usually creates all kinds of disastrous serious problems in relationships with their wives, their families, their girlfriends, or whoever they're with.

## Pornography's Connection to Crime

The Attorney General's Commission which published its report in July of 1986, reported that the estimated $8 billion criminal enterprise of pornography is controlled largely by organized crime. Although non-traditional organized crime is most responsible, the traditional La Cosa Nostra families also share a portion of the pornography profits. The pornography industry is not an isolated one. This criminal enterprise is interrelated with other criminal enterprises such as machine gun running, the numbers racket, arson and murder.

If pornography does in fact lead to criminal activity, and if it in fact has relationships to other criminal activity, it would be logical to assume that a reduction of pornography might also have a positive correlation with a reduction in crime. This has certainly been the case in Cincinnati, Ohio and Oklahoma City, Oklahoma. In Cincinnati, Ohio, over a 5 year period, the County Prosecutor closed down the pornographic outlets from a certain downtown neighborhood. At the end of that 5 years, with all the pornographic outlets closed, the major offense crime rate in that neighborhood had decline by 83%. These major offenses included robbery, theft, aggravated assault, rape and murder. In Oklahoma City, Oklahoma, during a 2 year span where they closed down many of the sexually oriented business, the rape rate in Oklahoma County went down 28%, while the rape rate across the state of Oklahoma increased.

## Pornography and Rape

The increase of the crime of rape has been staggering. Since 1960 the rape rate in America has increased over 400%. A national study done by researchers at Kent State University indicate that 28% of college women have experienced rape or attempted rape since age 14. This study is significant not only because it points out that more than 1 in 4 college women have experienced rape or attempted rape since the age of 14, but because other studies have shown that rape rates are higher among women who are in poor economic classes. Therefore, the 28% rate could actually be a conservative figure.

What is the connection between pornography and rape? Again, we must understand that pornography is a means of education. One of the ways that men learn about sexuality is through reading and viewing pornography. One of the inaccuracies that pornography teaches is that women enjoy being raped. This is a common theme in pornographic films. A women will be attacked by one or more men, and is forcibly raped. At first the women resists the advances of the man (men); as they continue to degrade, humiliate and inflict pain upon her, she gradually turns to the point where she actually enjoys it and eventually is begging for more. She finds ecstasy in the fact that she is being raped. Men all over America have their attitudes and opinions shaped by this material, and many of them act them out with their spouse, girlfriend, or a complete stranger. There were over 90,000 rapes reported in 1986 and untold thousands more went unreported. Andrea Dworkin testifies to this point:

> In this country where I live as a citizen real rapes are on film and are being sold in the marketplace. And the major motif of pornography as a form of entertainment is that women are raped and violated and humiliated until we discover that we like it and at that point we ask for more.

> In this country where I live as a citizen, women are penetrated by animals and objects for public entertainment, women are urinated on and defecated on, women and girls are used interchangeably so that grown women are made to look like five or six-year-old children surrounded by toys, presented in mainstream pornographic publications for anal penetration. There are magazines in which adult women are presented with their pubic areas shaved so that they resemble children.
>
> In the country where I live as a citizen, there is a pornography of the humiliation of women where every single way of humiliating a human being is taken to be a form of sexual pleasure for the viewer and for the victim; when women are covered in filth, including feces, including mud, including paint, including blood, including semen; where women are tortured for the sexual pleasure of those who watch and those who do the torture, where women are murdered for the sexual pleasure of murdering women, and this material exists because it is fun, because it is entertainment, because it is a form of pleasure, and there are those who say it is a form of freedom ...
>
> Pornography is used in rape - to plan it, to execute it, to choreograph it, to create the excitement to commit the act. Pornography is used in gang rape against women. We see an increase since the release of "Deep Throat" in throat rape - where women show up in emergency rooms because men believe they can penetrate, deep-thrust, to the bottom of a women's throat. We see increasing use of all elements of pornography in battery, which is the most commonly committed violent crime in the country, including the rape of women by animals, including maiming, including heavy bondage, including outright torture ...
>
> We see the average age of rapists going down. We are beginning to see gang rapes in elementary schools committed by elementary school boys imitating pornography. We see sexual assault after death where frequently the pornography is the motive for the murder because the man believes that he will get a particular kind of sexual pleasure having sex with a woman after she is dead ...
>
> When your rape is entertainment, your worthlessness is absolute. You have reached the nadir of social worthlessness. The civil impact of pornography on women is staggering. It keeps us socially silent, it keeps us socially compliant, it keeps us afraid in neighborhoods; and it creates a vast hopelessness for women, a vast despair. One lives inside a nightmare of sexual abuse that is both actual and potential, and you have the great joy of knowing that your nightmare is some else's freedom and someone else's fun.

On January 12, 1986, Linda Lee Daniels was abducted from her boyfriend's house in Albuquerque, New Mexico. Mr. Johnny Zinn had promised to pay $1,500 to three men to find what he called a "product" to appear in a hardcore pornography movie. The three men had approached a prostitute, but she refused their advances. Then the abductors went to a supermarket parking lot to stalk a victim. Their perfect "product" was Linda who was blond, attractive and alone. After kidnapping her, they took her to a motel room, drugged her, and then took pornographic pictures of each one raping her. Linda's family reported her missing, and the next day Mr. Zinn saw Linda's photograph in the newspaper. He gave directions to take her into the mountains. They shot Linda and left her body in the storm drain under the road.

Arthur Gary Bishop awaits execution on death row for the kidnapping, molestation and murder of 5 boys. In an open letter, Bishop details the awful influence of pornography on his life. Bishop says:

> I am a homosexual pedophile convicted of murder and pornography was a determining factor in my downfall. Somehow I became sexually attracted to young boys and I would fantasize them naked. Certain book stores offered sex education, photographic or art books, but it wasn't enough. From adult magazines I also located addresses of foreign companies specializing in kiddie porn and spent hundreds of dollars on their magazines and films. Some of the material I received was shocking and disgusting at first, but it shortly became common place. For me, seeing pornography was like lighting a fuse on a stick of dynamite. I became stimulated and had to gratify my urges or explode. The day came when I invited a small neighborhood boy into my apartment, molested him and then killed him in fear of being caught. Pornography wasn't the only negative influence in my life but its effect on me was devastating.

Dr. William Marshall, Queens University, studied a group of rapists at the Kingston Penitentiary in Ontario, Canada and found that 86% of the rapists admitted to regular use of pornography with 57% of those offenders admitting to actual imitation of pornography in the commission of their sexual crimes. In research conducted by Detective Lt. Darrell H. Pope of the Michigan State Police Department, 41% of all sex offenders who committed sex crimes from exhibitionism to murder, use some type of pornography just prior to, or during, the actual act. This 41% figure was from a total case history file of 38,000 cases.

Is pornography partially responsible for the alarming rape rate? Yes.

## Child Molestation

As you are well aware, the rate of child molestation in our country is currently alarming and growing in rapid proportions. As is the case with rape, there is no single cause for this dramatic increase. However, while no single cause can be pointed to, we can certainly attribute pornography as a contributing factor.

John Rabun, Deputy Director of the National Center for Missing and Exploited Children, reports that a study in Louisville, Kentucky, showed that out of 1,400 child sexual exploitation cases reported between July, 1980 and February, 1984, adult pornography was found in all 1,400 cases and child pornography was found in a significant number of them.

Dr. Abel and his colleagues reported in a 1986 study that homosexual and heterosexual child molesters average 30.6 and 60.4 child victims respectively before being caught and that child molesters will sexually abuse 380 children on the average in their life time. In that group which consisted of 240 sex offenders (average age 34 years) the sex offenders reported to clinicians that they had attempted or completed an average of 381 deviant acts per offender, against an average of 380 victims. If statistics hold true, many of the 380 children will become abusers to another 380 children.

The cycle of child victimization is alarming. Carter, et. al., in a 1984 study showed that many missing children (i.e., runaways, throwaways, abductions, etc.) become exploited children through prostitution, pornography and rape. While no accurate studies or statistics are available, it is clear that many sexually abused children become molesters and sexual abusers themselves if not treated early and adequately. A Los Angeles police department reports that most child molesters were themselves molested as children and that they generally seek out victims of the age around when they were first molested. In one survey, clinicians found that 57% of the child molesters studied reported that they were molested themselves as children.

As concerned citizens, as people who care for children, as people who care for families, we are constrained to bring an end to this cycle of child victimization. We must do whatever we can to keep children from being molested. We must go to the roots, to the source of what is precipitating these staggering statistics. Part of that root is pornography, and I urge this Congress to take firm action.

Does pornography contribute to the sexual molestation of children? Yes.

Children's Exposure to Pornography

Both the 1970 and 1986 Attorney General's Commission Reports on Pornography, have indicated the largest consumers of pornographic material are children between the ages of 12 and 17. It is generally known that while adult males are the largest buyers of pornography, they are largely unsuccessful in hiding it from their children. When a child finds the pornography, he tends to share it with his friends, thus multiplying the readership. Therefore, if you have one kid in a neighborhood who buys hard core pornography, it is quite possible that a majority of the kids in the neighborhood are also exposed to it. Mr. Kenneth Wooden, and investigative reporter formerly with CBS's "60 Minutes" and former co-producer of ABC's "20/20" took an informal survey of 539 elementary, junior high and high school students in Chattanooga, Tennessee. This study revealed that nearly 60% had seen X-rated films and this finding supported a recent federal study that showed 78% of all pornographic materials fall into the hands of children.

Mr. William Kelly, retired special agent for the FBI, testified that in a case they handled, 2 young boys ages 7 and 9, raped an 8 month old baby girl with a coat hanger and a pencil and killed her. When asked by child abuse detectives where they got the idea to do what they did, they said that they saw it in a magazine in their mother's pornography collection in her bedroom.

Do kids find hard-core pornography? Absolutely yes.

## Sexually Transmitted Diseases

The Center for Disease Control in Atlanta, Georgia, reports that there are over 20 different sexually transmitted diseases. According to CDC Director, Dr. James Mason, there are over 14,000,000 cases of sexually transmitted diseases (STD), including 50,000 reported AIDS cases each year. Most of these STD's occur in people under 25 years of age and according to Dr. Mason it is a battle that science cannot win. Dr. Mason says that,

> Almost every one of our sexually transmitted diseases is out of control. There are more cases of almost every one of those 20 in 1987

> than there were in 1986. A growing proportion of those cases are in young adults and adolescents. AIDS is just one manifestation of sexually transmitted diseases out of control, but similar patterns are occurring in the United States with regard to a number of other STDs. It doesn't matter which one we talk about, because they are out of control because the nation's behavior is out of control and I can't help but believe that an indulgent society that permits pornography on media that is seen casually by youth and adults, I can't help but believe that that is a significant contributor to the epidemic of STDs in our country. Technology just cannot compensate for the way that these diseases are spread and many of these diseases cannot be prevented by drugs or prevented by vaccine.

Does pornography contribute to the epidemic of sexual transmitted diseases, including AIDS? Yes.

## The Law

The Supreme Court has been clear on obscenity. The defenders of pornography have used the issue of free speech and the First Amendment as a smoke screen to cloud the issue. This would be an accurate strategy if the Supreme Court had not been so clear. In the Roth case in 1957, the question of obscenity and the First Amendment was dealt with. Justice William Brennan, writing for the Court's majority, wrote:

> The protection given speech and press was fashioned to assume unfettered interchange of ideas for the bringing about of political and social changes desired by the people ... expressions found in numerous opinions indicated that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.

What was the rationale behind the Supreme Court's opinion that obscenity is not protected by the freedoms of speech in the First Amendment? The First Amendment's concept of free speech has never been absolute. Freedom of speech was never intended to give unrestricted license. Therefore, things such as libel, slander, perjury, conspiracy, false advertising or incitement to violence such as yelling "fire" in a crowded theater, are all held to be illegal.

Second, the Court held that obscenity is not considered speech. Speech pertains to the realm of ideas, reason, and intellectual content. Dr. Frederick Schauer, professor of law at the University of Michigan Law School explains:

> The Court's treatment of pornography as nonspeech is a realization that the primary purpose of pornography is to produce sexual excitement. A distinction between the pornographic and the sexually explicit is completely artificial unless pornography is viewed as essentially a physical rather than a mental stimulus. Thus, the refusal to treat pornography as speech is grounded in the assumption that the prototypical pornographic item on a closer analysis shows more of the characteristics of sexual activity than of the communicative process. The pornographic item is in a real sense a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means.

Thus, the issue of the law, much like the issue of harm, is clear. The Court has never protected obscenity. We are asking Congress to build on the foundation that already exists, rather than building a new one.

## Support of Religious Leadership

The religious community within the United States has obtained remarkable unity on the issue of obscenity; perhaps more than any other social issue in recent church history. The issue of obscenity has united top level leadership from incredibly diverse theological backgrounds. Founded on July 25, 1986, at St. Patrick's Cathedral in New York City, leaders from numerous denominations and religious organizations, representing approximately 140 million Americans moved themselves to action against hard core and child pornography. At that historic occasion, the Religious Alliance Against Pornography agreed that they were in unanimous agreement that hard core and child pornography, which are not protected by the Constitution, are evils which must be eliminated (see Appendix A for the statement of the Religious Alliance Against Pornography (RAAP) and the list of those who signed that original statement).

**Member organizations of RAAP which are represented either by the top level leadership of the organization or by an appointed representative, include:**

Advent Christian Church
Advent Christian General Conference
American Jewish Committee
American Lutheran Church
Anglican Orthodox Church
Apostolic Catholic Asyrian Church
Armenian Apostolic Church
Armenian Church of America
Baptist Missionary Association of America
Christian Holiness Association
Christian Standard
Church of God (Anderson, IN)
Church of Jesus Christ of Latter-day Saints
Covenant House
Episcopal Church
Focus on the Family
General Baptist Church
General Conference, Methodist Church
Greek Orthodox Church
Institute of Black Family Development
Latvian Lutheran Church of America
Lutheran Church - Missouri Synod
Lutheran Council in U.S.A.
Mennonite Church
National Association of Evangelicals
National Conference of Black Pastors
National Conference of Christians and Jews
National Council of Churches
North American Baptist Fellowship
North American Native Christian Council
Pentecostal Free Will Baptist Church
Presbyterian Church U.S.A.
Reformed Church of America
Roman Catholic Church
Southern Baptist Convention
The Salvation Army
United Methodist Church
William Tyndale College

In addition to supporting the RAAP organization, many of these individual organizations have written and passed resolutions for action within their own organization.

Members of RAAP's (Religious Alliance Against Pornography) Executive Committee who were unable to testify at this hearing desired to make their voices heard on this specific piece of legislation. Appendix B is a statement these religious leaders desire for you to hear.

Public Opinion

As mentioned earlier, the largest body of pornographic material produced in the United States falls into the category of sexually violent material. As the American people become educated regarding this fact, there is an increasing widespread desire for restriction due to the harmful impact on society. Due to the efforts of groups such as the National Coalition Against Pornography, the general public is becoming educated to the fact that the airbrushed nudity found in magazines such as "Playboy" and "Penthouse," constitute a small minority of pornography available to the general public.

George Gallup, Jr. reports in a poll released in August of 1986 that Americans favor strong restrictions against pornographic material depicting violence and child pornography. Americans were asked to respond to items in one of three ways: a) the item should be totally banned for sale to adults; b) the item should be sold to adults as long there is no public display; or, c) the item should be sold to adults with no restrictions.

- 73% of Americans believe there should be a total ban on the sale or rental of video cassettes featuring sexual violence. This percentage shows a sharp increase from only a year earlier when 63% of Americans felt that these materials should be totally banned.
- 74% of Americans believe that theaters showing movies that depict sexual violence should be totally banned.

- 76% of Americans believe that magazines that show sexual violence should be totally banned.
- Only 4% of Americans believe that there should be no restrictions on this type of violent material.
- 92% of Americans believe that the sale or rental of video cassettes featuring sexual acts involving children should be totally banned. Only 2% believe that there should be no restrictions on this material.

In an article entitled "Dehumanization," Norman Cousins wrote the following:

> The trouble with this wide open pornography is not that it corrupts, but that it desensitizes; not that it unleashes the passions, but that it cripples the emotions; not that it encourages a mature attitude, but that it is a reversion to infantile obsessions; not that it removes the blinders, but that it distorts the view. Prowess is proclaimed, but love is denied. What we have is not liberation, but dehumanization.

Members of the Senate Committee on Judiciary, we believe that the evidence that you will hear, not only from this panel, but from others testifying on this issue, will constrain you to act in a manner consistent with the desires of the American people. The United States Supreme Court has been clear and decisive. Obscenity is not, nor ever has been, protected by the First Amendment freedom of speech. In their tripartite test of obscenity, they have given authority to the states and local communities to legislate and enforce the laws. Local courts are helping define community standards and state law makers are working feverishly to strengthen their state obscenity laws, many of which are upgrading obscenity from a misdemeanor to a felony, and seeking to incorporate the RICO statute in their state legislation. The strong action of this Congress will help make their job much easier. Federal, state and local prosecutors are painstakingly enforcing the current laws. Those in the criminal enterprise of pornography are seeking to push the limits of the law. These prosecutors all over are asking for the proper tools to do their job. While the federal law is good, it is not good enough. The law does not take into account modern technologies which pornographers use to disseminate their material. There are also enormous loopholes in the law which allow clear criminal activity to go unprosecuted simply because the law is inadequate. Men like Mr. Robert Bonner, who is a U.S. Attorney for the Central District of California which covers Los Angeles County, has recently established a task force of federal, state, county and city officials to attack the issue of obscenity. He will need all the help he can get to enforce the current obscenity laws. This Congress has the ability to give Mr. Bonner the tools he needs.

We urge you to act swiftly on behalf of victims such as the Minneapolis woman who testified that, "He would read from the pornography like a textbook, like a journal. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots and how to bind me in a way that I couldn't get out." It was reported in the Topeka "Capital Journal" that a 13 year-old boy molested a 4 year-old girl. The boy had seen several sex scenes on cable television and wanted to find out what sex was all about.

It would be easy to fill the largest room in the Capitol with people who have been victims of the criminal enterprise of pornography.

As our law makers, we know that you uphold the worth and dignity of each human being. We know that because our government is of the people, by the people and for the people, you will hear the voices of the courts, the law makers, the victims, the law enforcers and the American people in general. We therefore urge the Congress to act swiftly and with wisdom in the passage of the Child Protection and Obscenity Enforcement Act of 1988.

Senator **DeConcini**. Dr. Kirk, I thank you, and your testimony certainly demonstrates that you are representing a broad base of religious organizations who have strong beliefs and who have been at the forefront in opposition to this type of organized activity for a long, long time. I compliment you for your leadership there, as well as the organization, for taking the time to be with us again. I am sure it is discouraging not to see a little more legislation passed. But, quite frankly, your organization has been very helpful and supportive in passing some of the bills on child pornography and dial-a-porn and what have you. I think a great deal of credit goes to you and the members of your coalition.

Mr. Braidfoot, we will be glad to have your testimony now, if you would summarize it for us, please.

## STATEMENT OF LARRY BRAIDFOOT, GENERAL COUNSEL, CHRISTIAN LIFE COMMISSION, SOUTHERN BAPTIST CONVENTION, NASHVILLE, TN

Mr. **Braidfoot**. Thank you, Senator.

I would like to express appreciation on the part of those of us who are concerned about this issue for the very strong bipartisan support this legislation has received both in the House and in the Senate. We are grateful for very positive hearings in the House and are grateful to you, sir, for your leadership in providing hearings in this Senate.

Mr. DeConcini, I work with an agency, the Southern Baptist Convention, and the 36,000 churches and the 15 million members of those churches. The issue of pornography is one of the issues about which we Southern Baptists do not fuss very much. In the last 10 years, we have resolved on eight different occasions about the problem of pornography. We are not very good lobbyists, but we are very grateful to have the chance to say a word in support of S. 2033, as well as Mr. Specter's bill.

I will not duplicate the concerns that Jerry has addressed. I would simply note that in my testimony I included at the end summaries that were prepared by Elder Carmack of the Latter Day Saints Church as well as Cardinal Bernadin for testimonies which were presented in the House. I include them to describe in a very graphic way the diversity of support that exists for this particular legislation.

I would like to address a couple of comments about Mr. Specter's bill. There are ample experts far more gifted than I on the S. 2033 bill. It seems to me that Mr. Specter's bill addresses an issue whose time has come. One of the ways in which we can effectively address the kind of activity that is perpetrated by organized crime and behaviors that are destructive to human dignity and human personality is to get at the pocketbook. The best way to do that is to extend to the victims of those kinds of behaviors and enterprises financial remedies that in some way would allow for the restructuring of lives.

A child who is victimized sexually has a long period of rehabilitation ahead. A child who is victimized sexually for commercial profit has that same kind of reconstruction ahead of him, and that reconstruction and that therapy should be paid for by those who perpetrated the act.

I would like the privilege of including in the record subsequently a one-page statement that is currently being typed expressing support for Mr. Specter's bill. In deference to the schedule, I would yield back the balance of my time, sir.

[The one-page statement follows:]

# STATEMENT OF SUPPORT
# FOR
# S. 703

LARRY BRAIDFOOT
CHRISTIAN LIFE COMMISSION
SOUTHERN BAPTIST CONVENTION

S. 703, the Pornography Victims Protection Act, embodies a very needed concept currently missing in the law dealing with pornography and obscenity: The concept of restitution to a class of victims who may be permanently damaged by acts for which they have not given consent.

About the subject of pornography there is wide diversity of opinion in our society, but there would be few voices of support for any kind of pornography involving children or adults who have been coerced. Most adults who are victims of coercion are women. I note the very broad support this legislation has received from many women's groups concerned with women's rights, domestic violence and other threats to the status of women. They know well the tragic consequences of sexual coercion.

Children are the members of our society to whom our most special kindness is done. It is difficult to estimate the numbers of children whose lives are marred by the production of child pornography. Even if only a handful of children are victimized, this legislation would be needed, for to them, the consequences are tragic and real.

This legislation seeks to get at the heart of the problem by targeting those who are the producers and distributors of child pornography and coerced production of pornography. Laws of restraint serve important functions. Laws which tap the profits of these illegal activities to make reparation for damages can also play an important rode in offering hope to victims.

This bill has not received the attention it deserves. I congratulate the gentleman from Pennsylvania for his perseverance in again introducing this legislation previously introduced in the 98th Congress and the 99th Congress. I would hope that this distinguished committee will advance this bill to provide an important remedy for those victims who can be both protected and restored by its provisions.

[The prepared statement of Mr. Braidfoot follows:]

# Testimony in Support of
# S. 2033
# The Child Protection and Obscenity Enforcement Act

by

Larry Braidfoot
General Counsel
Christian Life Commission
Southern Baptist Convention

United States Senate
Committee on the Judiciary

Washington, D. C.

June 8, 1988

## EXECUTIVE SUMMARY

Over 36,000 churches cooperate together as the Southern Baptist Convention, with approximately 15 million members in those churches. My primary concern is to share with you the concern about child pornography and obscenity found among Southern Baptists. One way we express ourselves on issues is through resolutions adopted at our annual meetings. Eight times in the last ten years our annual meetings have addressed the broad subject of pornography.

Many of our concerns deal with matters subject to legal control. Many of our religious traditions teach special concern for the weak, the powerless, the widows, the orphans, and the helpless. In our day, children are among those most especially to be the subjects of our special concern. Our entire system of jurisprudence recognizes this as true. For that I thank you. Congress has just passed helpful legislation to deal with the problem of "dial-a-porn." For that I thank you. The legislation under consideration would round out this previously-expressed desire to protect our children by closing some existing loopholes related to computers and production of child pornography.

A second major concern is the interstate dimension to the pornography industry. Many of the troublesome issues related to pornography and obscenity result from their movement in interstate commerce. When most of the obscene materials, whether printed or video or movie, are produced by a small number of producers in a few geographical regions, the flow of such materials is not subject to effective control by state law. Federal law must exist to deal with the distribution problems which cannot be reached by state laws. The forfeiture provision can be one of the most effective means of curtailing the ongoing nature of corporate illegal behavior.

Our system of government assures us of many rights, among which the First Amendment rights to freedom of speech and freedom of religion are among the most cherished. We approach these rights in a manner that balances the right of the individual to freedom of expression and to act over against the rights of the broader society. That is what is involved in prohibiting the production and distribution of obscenity and child pornography.

S. 2033 is a step toward more constructively balancing the rights of the greater society by placing more precise limits on forms of speech such as child pornography and obscenity.

I am pleased to offer testimony in support of S. 2033, The Child Protection and Obscenity Enforcement Act.

My primary concern today is to share with you the kinds of concerns found among Southern Baptists and to represent these concerns to you as best I can. Southern Baptists are a diverse people and there are many issues on which we have our differences.

But I want to say to you today that child pornography and obscenity are among the things upon which we have a high degree of unanimity. One way we express ourselves on issues is through resolutions adopted at our annual meetings. Eight times in the last ten years our annual meetings have addressed the broad subject of pornography.

We are not a special-interest group for whom lobbying is a routine matter. We have not been positioned and oriented to making our views as well known as many other groups. But the problems related to child pornography and obscenity are problems about which we care very deeply. We are delighted at any indication that these problems are being taken with new seriousness.

We are cognizant of the legal tradition of which we are a part, with its strong foundation in the First Amendment and the guarantees of freedom of speech, the free exercise of religion, and the non-establishment of any religion. Many of the problems which concern us are not capable of legal resolution in our democratic tradition.

But other concerns are subject to legal control, and those concerns are the focus of my testimony urging support for S. 3889. My Southern Baptist tradition has many things in common with the broader Protestant tradition, the Roman Catholic tradition and the Jewish tradition, the three main religious traditions in our country. Our traditions share a belief in the authority of what is usually called the Old Testament, which teaches special concern for the weak, the powerless, the widows, the orphans and the helpless. In our day, children are among those most especially to be the subjects of our special concern.

It is not just these major religious traditions for whom children are due special care. Our entire system of jurisprudence recognizes this as true. This would be widely accepted in our society and is not the exclusive concern of religious groups.

I would call to mind two illustrations of how this special concern for children expresses itself in relevant bodies of law. First, laws against statutory rape are commonplace. Such laws are predicated upon the conclusion that children ought not to be exploited sexually and, therefore, children under designated ages are legally not competent to give consent for sexual intercourse. Second, in the field of commerce children are considered as minors not competent to give the consent necessary to enter into binding contracts. The purpose there is to prohibit financial exploitation.

Recently an indictment was handed down in Nashville, Tennessee against an employee of the state Department of Human Services for receiving through the mail photographs depicting the genitals of female minors. This indictment resulted from investigation involving, among others, the FBI and the U.S. Postal Service. The law against using the mail to distribute such materials is clear. We need to close a loophole which would allow the exchange of information about child pornography by computer.

A second major concern is the interstate dimension to the pornography industry. Our federal system of law has elected to treat the basic determinations related to obscenity under the authority of state law. While the Supreme Court has established the parameters of a definition of obscenity to assure that free speech is not infringed, the determination by contemporary community standards allows for a primary role of state courts and state standards.

Thus, citizens of a state have within their power to determine, within certain boundaries, what kind of state they will live in. If they choose a lax determination of obscenity and a lax law enforcement of obscenity standards, they have that right. However, if they choose a more stringent standard and more thorough law enforcement, they also have that right.

What is troublesome about the interstate dimension of the obscenity problem is that it interferes greatly with the capacity of citizens of one state to control the obscenity problem within their own state. Most of the troublesome issues related to pornography and obscenity owe their character to interstate commerce. The laws, and thus the law enforcement community of a state, reach only to their borders. When most of the obscene materials, whether printed or video or movie, are produced by a small number of producers in a few geographical regions, control of the flow of such materials is not subject to effective control by state law. Federal law must exist to deal with the distribution problems which cannot be reached by state laws.

Recent action by Congress to deal with the "dial-a-porn" problem illustrates this federal role. The teenagers of a particular state could be targeted and exploited by this new technology of transmitting pornographic, if not legally obscene, messages with the point of distribution being located in another state beyond the reach of state law.

Perhaps the most controversial dimension to S. 2033 will be the forfeiture provisions. I would urge the importance of this provision as one of the most effective means of curtailing the ongoing nature of corporate illegal behavior. A corporate entity located in one state could be active in distribution of obscene materials in state after state. Yet the payment of a fine is small compensation if the corporation continues operation and simply shifts its point of distribution to another state until drawing attention to itself there and perhaps inviting additional prosecution.

Obscene materials produced in one geographical location are distributed through the means of interstate commerce. The broadest possible prohibitions should be enacted to prohibit the use of interstate means of commerce and communications from being misused in a violation of the public trust. The forfeiture provisions would seem to be an essential element in reducing this repetitious and ongoing dissemination of obscene materials.

A landmark case is under way in Virginia dealing with the issue of forfeiture of assets resulting from racketeering operations in obscenity. It is my understanding that these proceedings are based upon general federal racketeering statutes. The corporate entity involved, according to newspaper accounts, had been convicted 15 times in one county of violating state obscenity laws and owed some $260,000 in fines. These facts indicate what many observers believe to be true in many cases: that a pattern of disregard for the law is perpetrated by dealers who continue to be involved in the distribution of obscene materials.

Many important questions must be answered for the concept of forfeiture to be used effectively in addressing the distribution of obscenity. A specific statute dealing with forfeiture in obscenity cases would appear to be the most appropriate and valid manner of providing the legal framework to address especially the matter of repeat offenders.

Our system of government assures us of many rights, among which the First Amendment rights to freedom of speech and freedom of religion are among the most cherished. The freedom of expression found therein is the bedrock of much of our civilization.

We are cognizant, however, that these rights are not absolute in their scope. Our government approaches these rights in a manner that balances the rights of the individual to freedom of expression and to act over against the rights of the broader society. That is what is involved in prohibiting the production and distribution of obscenity and child pornography. I regard S. 2033 as a step in the direction of more constructively balancing the rights of the greater society in placing limits on forms of speech that are destructive.

## CONGRESSIONAL HEARING ON CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1988

### SUMMARY OF TESTIMONY BY ELDER JOHN K. CARMACK
### THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

APRIL 28, 1988, 10 a.m.

I appear before you representing The Church of Jesus Christ of Latter-day Saints and as a member of the Steering Committee of the Religious Alliance Against Pornography, whose affiliate churches are alarmed by the spread of child pornography and hard-core obscenity in this country. Our commitment is to wage war against pornography in partnership with local, state, and federal governments.

We wholeheartedly support the First Amendment. However, the U.S. Supreme Court has clearly held that the First Amendment does not protect obscenity. This makes it possible to regulate it by law and prosecute criminals who violate the law.

It is self-evident that the use of children in creating pornography and the distribution of such literature to children and adults is morally wrong. Obscenity clearly desensitizes its users and increases the likelihood of male aggressiveness against women and children. Additionally, it decreases both male and female sensitivity to rape and the plight of the rape victim. Those of us who have been called upon to deal with abused and blighted lives know that almost without exception abused boys, girls, women, and even men are the victims of those stirred up in part to aggression and abuse by pornography.

We assert that this is a public safety issue demanding action to protect the innocent and halt the spread of harmful material leading to exploitation of women and children.

One of the noblest roles of government is to protect those who are least able to protect themselves. We can protect the victims of child pornography and obscenity, as witnessed by the commendable efforts of the Los Angeles County Board of Supervisors and plans of the U.S. Attorney General for Southern California to set up a special task force to prosecute distributors of pornographic materials. We support, therefore, the Act now before you, which would strengthen existing laws in important and specific ways.

First, we support legislation to protect children from exploitation, require record-keeping which would make prosecution easier against producers, distributors, and retailers, make it clear that it is against federal law for even a parent to use a child in producing pornography, prohibit exchange of information concerning child pornography through computer networks, and address other deficiencies in our current laws.

Second, a stronger federal role in combating obscenity is warranted because of the growing presence of organized crime in the multi-billion dollar obscenity industry and because of the interstate and international scope of the problem.

Finally, we support the protection of children this Act would provide by its prohibition of transmission of obscenity over cable or subscription television. For the same reason we salute recent initiatives by the Congress and the FCC to eliminate Dial-A-Porn.

A choice should be made to protect those who are victimized because of obscenity as contrasted to those who profit from its sale and consumption. Passage of the "Child Protection and Obscenity Enforcement Act of 1988" will provide additional useful tools to curb the floodtide of illegal obscenity in this country.

ARCHDIOCESE OF CHICAGO

## STATEMENT OF CARDINAL JOSEPH BERNARDIN, ARCHBISHOP OF CHICAGO

House Sub-Committee on Crime Hearing
Re: The Child Protection and Obscenity Enforcement Act

April 28, 1988

In all senses of the phrase, pornography is no respecter of persons. Children are victimized; women are degraded; men are perverted; the young and the insecure are seduced; families are undermined; personal and social relations are twisted. God's gift of sexuality is stripped of the personal dignity, human tenderness, mutual love, and ethical commitment that are part of the divine plan for human happiness and social good.

Nonetheless, some people are reluctant to act in opposition to pornography because of rightful concern about important First Amendment freedoms. As religious leaders, we need to be consistently clear about two points: We are opposed to censorship. We are also opposed to obscenity and child pornography which, by definition, stand outside the protection of the First Amendment.

Informed by the findings of the Attorney General's Commission on Pornography, Congress -- in the initial forum of this committee -- is considering the Child Protection and Obscenity Enforcement Act. This bill, if enacted, will extend obscenity law to newer technologies, will further protect children from pornographic exploitation, and will provide financial penalties for criminal obscenity.

The dignity inherent in each individual and society's interest in protecting the vulnerable and promoting the common good urge the passage of this bill. Although I cannot be present with you today, I want to voice my support for the Child Protection and Obscenity Enforcement Act.

Senator **DeConcini**. Thank you very much, Mr. Braidfoot. We will provide your statement on the Specter bill in the record. We thank the Senator for his interest in this area.

I agree with you the time has come and it is time to move, and I thank you for the outstanding work that the Southern Baptist Convention has done on many fronts, in moral values and religious beliefs, but certainly in this area we are most appreciative.

Dr. Kirk, I have sometimes heard the argument that the people behind the movement to fight obscenity and child pornography are being led by the Moral Majority. I have also heard that it is the religious zealots who want to take away the first amendment freedoms of individuals and force their religious beliefs on the masses. Yet as I review your testimony, I was struck by the huge number of people your organization coalition represents, some 140 million.

You pointed out some of the religious groups, but could you comment a bit on the makeup of the Religious Alliance—when were you formed? What is the nature? What are your meetings?—so we have on record who these 140 million people are that I like to believe that you are speaking for, having you come here and make such representations?

Dr. **Kirk**. I would be glad to do that. In fact, Senator, I have submitted a complete list in my written testimony.

Senator **DeConcini**. They are included in your statement. Very good.

Dr. **Kirk**. Let me just speak to that, because never in history, Cardinal O'Connor introducing the meeting at his home in July 2 years ago said that this is the broadest coalition that has ever come together in history to deal with any social problem.

We had all the cardinals of the Roman Catholic Church, the head of the bishops of the Roman Catholic Church, the head of the Greek Orthodox Church, and of the Orthodox Council of North and South America, 10 million. That is 53 million Roman Catholics. We had four of the leading rabbis representing approximately 8 to 10 million Jewish people in our country.

When we were lining up to go out to the steps of St. Patrick's Cathedral to meet the press, I looked at the group and said, "We represent over 100 million people." And Rabbi Tannenbaum said, "Jerry, I hate to disagree with you the first day we have ever met, but I want you to know we represent 150 million Americans." And he began to describe all the people there.

We have the most mainstream and more liberal Protestants, all the way to the most conservative evangelical and Pentecostal Protestants, the Mormon Church, Church of Jesus Christ of Latter-day-Saints.

I was told the day before that meeting: "You will never get this group to agree on anything. I cannot even believe you got them to come into the same room." And I said, "Well, it is not my task to get them to agree. That is their task. I am merely there to facilitate the discussion." And we discovered that within 2½ hours we were in unanimous agreement—and it is in our official statement—that hard-core and child pornography, which are not protected by the first amendment, are evils which must be eliminated. This was the National Council of Churches, National Association of Evangelicals, and everybody in between.

We did not realize it at the time, but afterwards we evaluated. We had every ecumenical group in America represented at that meeting. Yet there was total unanimity. And by the way, you asked how often we meet. We have a meeting every year where there has been from two to four hundred leaders, and our executive committee meets every month by conference call. There are 18 on the executive committee representing that entire spectrum.

Senator DECONCINI. Dr. Kirk, thank you for that background. I wonder on another subject, just out of curiosity—and I would like maybe to chat with you some time—do you think there is an opportunity, or maybe there already has been, for the broad-based national coalition to consider other subjects, such as drugs? Or you really do not want to get out of this particular area of concern?

It seems to me we need this type of coalition of religious leaders across the country to address the drug problem, for instance, in our country and what to do about it.

Dr. KIRK. We have talked at length, and we have chosen intentionally to focus on illegal child pornography and obscenity. That is what has brought the broad coalition together. We have agreed not to go into any other things. We have also affirmed our commitment against censorship. We are for the enforcement of the laws against illegal material, but we are against prior restraint by the Government of material.

Senator DECONCINI. Thank you.

Both Dr. Kirk and Mr. Braidfoot, how do you respond to the argument that parents should be responsible for preventing their child from viewing pornographic and obscene materials by teaching them and controlling them? I know this is not realistic, but, you know, has our society changed so much that it is impossible to set these values in the home and in the church and in the schools?

Mr. BRAIDFOOT. Sir, I would say that certainly the focal responsibility lies within the home. May I share an experience from a colleague in Jackson, Mississippi, who shared with me commercially printed brochures which had been found on the playgrounds at an elementary school in Jackson, Mississippi, advertising dial-a-porn facilities and services and providing the numbers, and the pictorial representations were of a kind to inflame the imagination and the curiosity of adolescent males.

Those kinds of brochures did not just happen to be there. They were commercially prepared; they were commercially distributed for commercial purposes; and they were distributed outside the home. There is a sense in which there is a responsibility we as society have to deal with some of those kinds of things, especially, it seems to me, where we are dealing with an industry that is interstate in nature, which cannot effectively be dealt with on the basis simply of State laws. It seems to me that there is a very strong role on the part of the Federal Government to provide the tools and the mechanisms for addressing a problem that is interstate in nature which cannot be controlled not only by the parents but even by the State in which that parent resides.

Senator DECONCINI. Do you have any comment?

Dr. KIRK. Just to add this brief comment. The Supreme Court has indicated that we have the right to protect the quality of life in our communities. What the pornographers have done is tried to force their morality upon the American people. People have said to me again and again, "Well, you are religious people trying to force your morality upon us." I said, "That is very interesting. What I am trying to do is to have the laws of the land, the Federal laws and the laws of 46 States enforced. What I am trying to do is have the official rulings of our Supreme Court lived out in our country."

I am trying not to force my morality on the Nation but to keep the pornographers from using television, magazines, dial-a-porn to force their morality upon us. The laws and the court have said we have the right to do that. Parents need help. Parents find it difficult to raise their children today, especially when they are one-parent families, and when the environment is literally inundating their children.

Dr. Eileen Lindner of the National Council of Churches, when I told her that 2 million children were molested last year in America and that that is what led me into this battle, she said, "Jerry, that is absolutely appalling to me. But let me tell you something that is more appalling to me." Then she looked me in the eye, and she said, "Jerry, there is not a child in America that can grow up with innocence."

When you and I grew up, there was a latency period from age six to 12 or 13. The pornographers have so inundated America with their sexually explicit and hard-core material that no child can have that latency periods ages six to 12 or 13.

That is the point you are speaking to. Parents do not have the possibility right now.

Senator DECONCINI. Of having that available for their children.

Dr. KIRK. That is right. So this legislation—and if I can just add this one word: The urgency to bring this before the Senate, one more year from now is too late because so many children are being molested.

Now, I know pornography is not the only cause of it, and I know the elimination of illegal pornography is not going to eliminate that problem totally. But what it does is begin to deal with that problem and begin to deal with the material that is leading people to believe it is OK to see children as sex objects.

Senator DECONCINI. Thank you, Dr. Kirk. I have a couple other questions; I would ask, if you have time, if you would answer them for us. Due to time I yield to the Senator from Iowa for any opening statement or questions.

Senator GRASSLEY. Mr. Chairman, I am not going to take the time of the committee or the witnesses to go through my statement, because it is basically a repeat of things that I have said to the committee before on aspects of my legislation, S. 2021, the Child Freedom From Sexual Exploitation Act.

First of all, I want to commend you, Mr. Chairman, for holding the hearing, and then I would ask that my statement be printed in the record at the appropriate place.

Senator DECONCINI. Without objection.

[The prepared statement of Senator Grassley follows:]

# STATEMENT OF SENATOR CHARLES E. GRASSLEY
## SENATE JUDICIARY COMMITTEE
## HEARING ON PORNOGRAPHY

JUNE 8, 1988

MR. CHAIRMAN, I WANT TO COMMEND YOU FOR HOLDING THIS IMPORTANT HEARING TODAY. OUR TASK TODAY IS TO FURTHER THE CONGRESS' SUCCESSFUL EFFORT IN APRIL TO BAN DIAL-A-PORN TELEPHONE SERVICES, IN SPITE OF THE INFLUENCE OF THE PORNOGRAPHY LOBBY.

MR. CHAIRMAN, EVEN WITH OUR RECENT VICTORY, I AM STILL VERY CONCERNED ABOUT THE PERNICIOUS EFFECTS THAT THE MULTI-BILLION DOLLAR PORNOGRAPHY INDUSTRY HAS ON OUR SOCIETY.

SINCE THE BEGINNING OF MY SERVICE IN THE CONGRESS, I HAVE BEEN ESPECIALLY CONCERNED ABOUT PROTECTING ONE OF OUR NATIONS'S MOST IMPORTANT RESOURCES -- OUR CHILDREN -- FROM ABUSE AND EXPLOITATION BY PORNOGRAPHERS, PEDOPHILES, AND OTHERS.

IN FACT, DURING THE 99th CONGRESS, I INTRODUCED THE CHILD ABUSE VICTIMS' RIGHTS ACT. AFTER ITS APPROVAL BY THE SENATE JUDICIARY COMMITTEE, MY BILL WAS SIGNED INTO LAW AS A PART OF PUBLIC LAW 99-591.

THE PROVISIONS FROM MY BILL THAT ARE NOW THE LAW OF THE LAND INCLUDE THE CREATION OF A NEW FEDERAL CIVIL REMEDY THAT FINALLY GIVES VICTIMS OF CHILD PORNOGRAPHY -- THE CHILDREN -- THE ABILITY TO SUE THEIR VICTIMIZERS IN FEDERAL COURT FOR DAMAGES, COURT COSTS, AND ATTORNEY'S FEES.

SINCE THE PASSAGE OF MY BILL IN 1986, THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY HAS REPORTED TO THE PRESIDENT ON ITS FINDINGS REGARDING THE EFFECTS OF PORNOGRAPHY ON OUR SOCIETY.

ACCORDING TO THE PORNOGRAPHY COMMISSION, "WHAT IS COMMONLY REFERRED TO AS CHILD PORNOGRAPHY IS NOT SO MUCH A FORM OF PORNOGRAPHY AS IT IS A FORM OF SEXUAL EXPLOITATION OF CHILDREN." BASED UPON ITS FINDINGS, THE PORNOGRAPHY COMMISSION MADE RECOMMENDATIONS ON HOW TO CONTROL THIS DEGRADING ENTERPRISE.

I HAVE STUDIED THIS REPORT VERY CLOSELY, ESPECIALLY WITH REGARD TO ITS RECOMMENDATIONS ON PREVENTING THE SEXUAL EXPLOITATION OF CHILDREN. BASED UPON MY READING OF THE COMMISSION'S REPORT, I BECAME AN ORIGINAL CO-SPONSOR OF THE PRESIDENT'S "CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT", WHICH IS THE CENTERPIECE OF OUR HEARING TODAY.

I ALSO INTRODUCED "THE CHILD FREEDOM FROM SEXUAL EXPLOITATION ACT", WHICH IS A NATURAL OUTGROWTH OF MY SUCCESSFUL 1986 EFFORTS.

I WOULD LIKE TO TAKE A MINUTE OF THE COMMITTEE'S TIME TO DISCUSS MY BILL, WHICH ACCOMPLISHES SEVERAL THINGS:

**IT PROHIBITS COMPUTERS FROM BEING USED FOR THE PURPOSE OF SETTING UP NATIONWIDE "NETWORKS", WHICH OTHERWISE ENABLE CHILD MOLESTERS, PEDOPHILES, AND COLLECTORS OF CHILD PORNOGRAPHY TO TRAFFIC IN CHILD PORNOGRAPHY. THIS IS A RECOMMENDATION OF THE PRESIDENT'S COMMISSION ON PORNOGRAPHY.

**IT PROHIBITS A PARENT OR OTHER ADULT WITH CUSTODY OF A MINOR CHILD, FROM SELLING THAT CHILD FOR USE IN THE PRODUCTION OF PORNOGRAPHY. THIS IS A RECOMMENDATION OF THE PRESIDENT'S COMMISSION ON PORNOGRAPHY.

**IT REQUIRES PRODUCERS AND CERTAIN DISTRIBUTORS OF SEXUALLY EXPLICIT MATERIALS TO KEEP AND MAINTAIN VERIFIABLE RECORDS WITH RESPECT TO THE AGE AND IDENTITY OF EACH PERFORMER APPEARING IN DEPICTIONS OF "ACTUAL SEXUALLY EXPLICIT CONDUCT".

BECAUSE THERE HAS NOT BEEN A RECORD-KEEPING REQUIREMENT, IT HAS BEEN VIRTUALLY IMPOSSIBLE TO PROVE THE AGE OF THE PERFORMER IN THE SEXUALLY EXPLICIT MATERIAL. THIS HAS ALLOWED PORNOGRAPHERS TO EVADE FEDERAL LAWS THAT ARE SUPPOSED TO PROTECT ALL PERSONS UNDER THE AGE OF 18 FROM EXPLOITATION.

**IT AMENDS THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) ACT TO COVER CHILD PORNOGRAPHY OFFENSES. MUCH OF THE GROWING COMMERCIAL MARKET FOR CHILD PORNOGRAPHY IN OUR COUNTRY IS PRODUCED AND DISTRIBUTED BY NETWORKS OF PEDOPHILES AND CHILD MOLESTERS WHO ARE WELL-ORGANIZED. THIS IS A MUCH-NEEDED LAW ENFORCEMENT TOOL IN THE FIGHT AGAINST CHILD PORNOGRAPHY.

**FINALLY, MY BILL AMENDS THE CIVIL REMEDY PROVISION THAT IS A PART OF MY 1986 LEGISLATION. MY NEW CIVIL REMEDY PROVISION WOULD ALLOW A MINOR WHO IS THE VICTIM OF SEXUAL EXPLOITATION OR JUVENILE PROSTITUTION TO SUE IN U.S. DISTRICT COURT AND RECOVER TRIPLE ACTUAL DAMAGES, PLUS COSTS, INCLUDING REASONABLE ATTORNEY'S FEES.

I BELIEVE THE SANCTIONS PROVIDED FOR IN MY BILL, PROVIDE FOR MUCH NEEDED CRIMINAL ENFORCEMENT TOOLS AGAINST THOSE WHO ABUSE OUR CHILDREN THROUGH SUCH SORDID ENTERPRISES.

I BELIEVE THAT MY LEGISLATION ADDRESSES THE NEED TO KEEP THE PRESSURE ON THE PRODUCERS AND DISTRIBUTORS OF CHILD PORNOGRAPHY. MY BILL RECOGNIZES THAT THERE ARE MANY HARMS THAT CAN BEFALL CHILDREN WHO ARE USED IN THE PRODUCTION OF PORNOGRAPHY; AND CONSEQUENTLY, IT RECOGNIZES THE RIGHTS OF THESE CHILDREN NOT TO BE THE VICTIMS OF SEXUAL EXPLOITATION.

OUR FUTURE AS A CIVILIZED PEOPLE MAY JUST DEPEND ON THE OUTCOME OF THE BATTLE AGAINST PORNOGRAPHY.

I KNOW THAT THE TESTIMONY GIVEN TODAY ON THE ANTI-PORNOGRAPHY LEGISLATION BEFORE OUR COMMITTEE WILL BE VITAL TO US AS WE PREPARE TO CONSIDER THIS ISSUE.

THANK-YOU, MR. CHAIRMAN.

Senator GRASSLEY. My questions are a little more related to the contents of the legislation. I want to talk about computers and recordkeeping and asset forfeiture. But I do not want to have my questions detract from what has been the most important aspect of this hearing: that is the exchange between you and the chairman, your statements about the broad base of interest throughout various religious organizations and the public generally for this, and how serious the problem is. I think sometimes we tend to concentrate in these hearings too much on the details of the legislation. The details of the legislation are of little consequence compared to the thorough explanation of the problem as you have given it, and the broad base of support as you see it for solving that problem.

I want to thank you for your work, and there are a lot of organizations not represented here who would share your views that are back there cheering you on for your leadership.

I thank you, Mr. Chairman, for giving them the opportunity, and your questions are very appropriate.

Senator DECONCINI. Thank you, Senator. You may proceed.

Senator GRASSLEY. Why do you believe that it is essential to close the loopholes in the current Federal law regarding the use of computers to relay information on child pornography?

Dr. KIRK. Because those computers are used primarily for pedophiles and primarily as a means that helps them expand the exploitation and sexual abuse of children. We need to have laws that deal with the latest medium and areas by which pornographers and their users can exploit children. This will deal with that effectively, we believe.

Senator GRASSLEY. Do you intend to say that more strongly than the Attorney General's Commission said it? Or do you feel that they spoke strongly enough to that point as well?

Dr. KIRK. Well, we believe they have spoken strongly enough, and we believe this legislation will deal with it.

Senator GRASSLEY. There are other loopholes in the Federal law regarding the production and distribution of pornography. Give me your views on why we need to close some of those other loopholes.

Dr. KIRK. Well, for me, there are two primary areas of concern, and one has to do with interstate transportation. Right now, we actually have to catch the truck at the boundaries of the State and see the material and then prosecute. What this legislation will do will clarify something that is very, very obvious. If it is produced in one State and if it is being sold in another, it has obviously been transported across the State. That is very, very crucial to help deal with the mass distribution of hard-core pornography.

Forfeiture is the other part. I could speak to every aspect, but if I were to lift out the most important, we believe that this will show the pornographers that it is no longer profitable for them to traffic in illegal material; that when it becomes a danger of them forfeiting all that they have ever made through the sale of such material, that will become too risky, and they will, in fact, stop pandering illegal obscene material. So forfeiture seems to be extremely important in helping break the backs of organized crime's involvement in this problem.

Senator **Grassley**. I was going to ask about forfeiture. Is it the illegality of it and only that point that justifies confiscation? Or is there another rationale?

Dr. **Kirk**. I believe that it is the involvement of organized crime—pornography is only one part of all of that enterprise, but it is a significant part. It is probably the third largest money producer for organized crime. And so when we get into place the laws that will enable prosecution of illegal material, including wiretapping and including forfeiture, then it will enable us to be more effective in dealing with organized crime and its total involvement.

Senator **Grassley**. I want your description of the role of recordkeeping requirements of my bill and also the chairman's bill in the fight against pornography.

Dr. **Kirk**. I believe that having to have those records will lead pornographers to tend not to use children and adolescents. The very fact that they must have a record that these young people are at least 18 years of age will be a tremendous deterrent to pornographers' seducing, recruiting young people into this illicit industry.

Senator **Grassley**. Mr. Braidfoot, on any of these points, is there anything you want to contribute?

Mr. **Braidfoot**. Perhaps a summary statement, Senator.

It seems to me that the pornography industry is an evolving industry. It is an evolving industry because there is a large amount of money to be made out of appealing to and stimulating the interests of a small segment of American society. As such, I would not be surprised if 3 or 4 years from now we are not back in this same room looking at other loopholes that need to be closed, newer forms of technology that somehow or other have become available that we do not anticipate at present being used. There is a need for a continual kind of vigilance on this so that it is not likely to be a problem that goes away.

I think that underscores the urgency of the forfeiture provision because anything that can be done to minimize the profitability of this kind of industry which traffics in human bondage and suffering will at least minimize and dampen and slow the interest in evolving that industry into something that is bigger and larger.

Senator **Grassley**. Mr. Chairman, I am done. I would like to submit questions to Panel No. 1, which panel I was not here to ask questions of, and also Panel No. 3.

Senator **DeConcini**. It will be so ordered, and I know they will respond.

Thank you very much. We appreciate your testimony here today.

The third panel will be Mr. Barry W. Lynn, Legislative Counsel, American Civil Liberties Union; Dr. George Klein, President of George Klein News, and past Chairman, Council for Periodical Distributors Associations; Mr. Ed Morrow, a Vermont book seller, and President-Elect of American Booksellers Association; and Ms. Heather Grant Florence, past General Counsel of Media Coalition, Inc.

Ladies and gentlemen, welcome. We are very pleased to have you and your important testimony regarding constitutional rights. We look forward to your testimony.

Because of the time, we would ask that you please summarize your statements. We will see that the full statements are included in the record, and we will start with you, Mr. Lynn.

## STATEMENT OF PANEL CONSISTING OF BARRY W. LYNN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, DC; GEORGE R. KLEIN, PRESIDENT, GEORGE R. KLEIN NEWS, AND PAST CHAIRMAN, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, CLEVELAND, OH; ED MORROW, VERMONT BOOKSELLER AND PRESIDENT-ELECT, AMERICAN BOOKSELLERS ASSOCIATION, NEW YORK, NY; AND HEATHER GRANT FLORENCE, ON BEHALF OF MEDIA COALITION, INC., NEW YORK, NY

Mr. LYNN. Thank you very much.

It is no secret that the ACLU does not believe that obscenity laws are themselves a wise idea. Obscenity remains an elusive concept whose definition is so subjective that it has, indeed, baffled American judges and juries for decades.

A review of the statements of some of the earlier and subsequent witnesses in support of this bill makes it clear once again how wrong the Supreme Court was, how profoundly wrong, when it suggested that obscenity is entitled to no first amendment protection because it contains no ideas. To the contrary, it is precisely the ideas in it—for example, that sex should be divorced from marital relationships—that its opponents find so offensive that they seek to ban it from the culture. If they were not concerned about the communicative power of these ideas, they would not be here urging you to enact new laws to suppress it.

There are currently 32 Federal laws regulating sexual material; most of them are rarely, if ever, enforced in most jurisdictions. I would submit that there has been absolutely no evidence to suggest that more are needed. I do realize that some witnesses today want to treat the report of the Attorney General's Commission on Pornography as if it were holy writ; but having observed that process from its genesis to its conclusion, I can assure you that it is not yet worthy of canonization.

The Commission, in fact, has largely polluted the debate about pornography by drawing unsupported legal and scientific conclusions from very limited data, and by using an investigative methodology which I think is, quite frankly, irresponsible. The so-called evidence collected by the Commission did not establish that pornography was a serious national problem. Indeed, for most Americans, it is essentially as invisible as it is irrelevant.

Moreover, this characterization by the Justice Department of people who might sell pornography as major criminals is a most strained construction. In fact, this bill allows extraordinarily harsh law enforcement techniques to be used against booksellers and video dealers who sell sexual material, even to consenting adults, as if their crime was the same as that of arsonists, loan sharks, illegal arms dealers, and hired killers. It is not.

We object vigorously to many of the provisions in this bill. I would just like to highlight a very few. Section 205 would make it a Federal crime for a Government employee to possess an obscene video in her desk drawer as she awaits lunch hour to return it to the rental shop, or for a service member to have a so-called obscene magazine in his car as he returns to the barracks. This eviscerates the guarantee of privacy in regard to personal use of material which has already been established, in our judgment, by the Supreme Court.

Another section, 202, would actually permit the seizure of the entire inventory of a store and all of its fixtures upon conviction of the owner for selling a single obscene item. This goes far beyond RICO. What would this include in the average video store? First to go would be the inventory purchased subsequent to the first rental of the obscene video since that would, in the words of the statute, be traceable to other proceeds obtained for such offense.

In effect, if "The Erotic Adventures of Pinnochio" is deemed obscene, then the FBI can seize the Walt Disney version of "Pinnochio" as well.

All the fixtures are forfeited as used to commit or promote the offense. This includes the display racks and the lights which permits customers to read the box labels.

The forfeiture provision is wildly disproportionate to the crime, and it is hard to imagine a more chilling prospect for the average video dealer in Arizona or South Carolina than to know that his entire stock may be seized if he sells the wrong tape to the wrong person in the wrong place at the wrong time.

The forfeitures would be a classic example of unconstitutional prior restraint because the purpose, as well as the effect, is to restrict future speech on the basis of past transgressions.

A third section essentially federalizes all local and State obscenity violations—that is section 201—makes it extremely easy to prosecute distributors of obscenity under Federal law even in those States where the citizens or courts of the State have chosen to permit distribution of sexual material to adults. This is really a most unfortunate distortion of Federalism made even more constitutionally suspect because the very heart of obscenity law is that the material violates community standards, not the standards of some national censor in the Department of Justice. This same section could actually make it a Federal crime for someone cleaning out his basement to give his neighbor his old adult magazine collection.

A fourth objectionable provision imposes very burdensome recordkeeping requirements on anyone who produces depictions of actual sexually explicit conduct. Of course, there is nothing inherently unlawful about showing sexual conduct, whether that is a scientific treatise or an adult movie. So these requirements, then, represent an unconstitutional content-based impediment to the production of what we must presume in our constitutional system to be protected speech. If there is no Federal recordkeeping requirement for the people that are depicted in Road and Track or "Star Wars," then there can be no before-the-fact requirement for such recordkeeping for Hustler or "Debbie Does Dallas."

Let me just conclude by saying that Senator Specter's more innovative Victims Protection Bill, in our judgment, also raises very serious constitutional problems for us based primarily on the vagueness of certain of its key terms and the danger of essentially creating Federal remedies for conduct which may, indeed, represent bad judgment more than it represents actual physical coercion.

Thank you.

[The prepared statement of Mr. Lynn follows:]

# TESTIMONY OF

BARRY W. LYNN

LEGISLATIVE COUNSEL

AMERICAN CIVIL LIBERTIES UNION

BEFORE THE

SENATE JUDICIARY COMMITTEE

REGARDING

S.2033

"THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT"

AND

S.703

"THE PORNOGRAPHY VICTIMS PROTECTION ACT"

JUNE 8, 1988

## Summary of Testimony

The American Civil Liberties Union strongly opposes the enactment of many provisions in S.2033. It represents a vast expansion of federal law enforcement powers in the area of obscenity, an expansion which is wholly unjustified by the Report of the Attorney General's Commission on Pornography or any other factors. The methodology utilized by the Commission was so flawed that its conclusions and recommendations do not lend credible support to the need for sweeping new law enforcement initiatives.

Although the ACLU does not believe that "obscenity" should be viewed as an exception to the protections of the First Amendment, much of S.2033 is so extreme that it should be opposed even by those who have no philosophical objection to the regulation of "obscenity". This legislation repeatedly treats the seller of a single book or film which is subsequently deemed "obscene" by a judge or jury as a hardened criminal not unlike an illegal arms merchant, an arsonist, or a loanshark. It will have a chilling effect on every bookshop, video dealer, broadcast and cable outlet, newsstand, and movie theater in the nation.

We particularly object to provisions which would, as a practical matter:

*make it a federal crime for a government employee to possess an obscene video in his desk drawer or for a servicemember to have an obscene magazine in his car as he returns to the barracks. (Section 205)

*allow the seizure of virtually the entire inventory and fixtures of a bookstore chain or video store upon conviction of selling even one obscene item. (Section 202)

*make it a federal crime for someone cleaning out his basement to give his adult magazine collection to his neighbor if one of the items was later determined to be "obscene" (Section 201)

*force all magazine publishers and filmmakers who depict actual sexual activity to keep complex records regarding models, or face a legal presumption that the models are all minors. (Section 103)

*essentially federalize all state and local obscenity matters and make it easy to prosecute persons for distributing obscenity even in states where distribution of obscenity is not a state crime. (Section 201)

The ACLU urges that the Committee focus its attention not on new ways to restrict communication about sex, but rather on actual sexual abuse of individuals. We also oppose enactment of S.703.

Mr. Chairman and Members of the Subcommittee:

My name is Barry W. Lynn, legislative counsel for the American Civil Liberties Union. I appreciate the opportunity to testify this morning regarding S.2033, entitled "The Child Protection and Obscenity Enforcement Act", and S.703. The American Civil Liberties Union is a national, non-partisan membership organization with approximately 250,000 members dedicated to the preservation and enhancement of the principles embodied in the Bill of Rights of our Constitution.

## What Is Wrong With "Obscenity" Regulation?

It is no secret that the American Civil Liberties Union is opposed to "obscenity" laws, believing that such efforts to carve out an exception to the First Amendment for certain sexually-oriented communications are damaging to the concept of free expression. However, is not my purpose today to reflect at length on the philosophical and constitutional problems we have with such laws. (A more complete discussion is available in the rebuttal I prepared for the ACLU to the Report of the Attorney General's Commission on Pornography entitled Polluting the Censorship Debate.) Let me simply make a few general observations.

Although it is true that not every use of words or pictures triggers the protection of the First Amendment, only in the area of "sexual speech" (pornography is nothing more than speech - words and pictures - about sex) has the Supreme Court permitted legislatures to suppress material on the basis of "offensiveness" to the majority or its lack of "serious" value. That is precisely what it did, however, in Miller v. California 413 U.S. 15 (1973). Miller rests on a test of community offensiveness and not on any demonstration of tangible harm caused by "obscene" materials. In other areas of free expression, the Court has required that suppression follow a determination that the speech represents a "clear and present danger" of inciting imminent lawlessness. See, for example, Schenk v. United States 249 U.S. 47 (1919); Brandenburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana 414 (1973)

Moreover, the entire construct of "obscenity" is highly subjective, with each prong of the Miller test lacking a clear and precise meaning. This is vitally important in considering what, if any, new laws to enact to regulate obscenity. Justice William Brennan, in a famous dissent, summarized the definitional problem of "obscenity" so well that it rings as true now as in 1973: "we are manifestly unable to describe it except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech".

Distributing or possessing "obscene" material is not an offense which the common law might know as malum in se. Distributing a book to a willing adult who has asked to purchase it simply does not carry the sense of lawlessness or evil (even if it is later determined to be obscene) that accompanies other criminal acts like murder, arson, or robbery.

We do not find any of the efforts to distinguish the content of "obscene" material from other material to be analytically or constitutionally persuasive. Indeed, many of its critics and would-be suppressors, quite correctly recognize its moral and political message, and wish to be rid of pornography precisely because they do not want those messages successfully communicated. For example, to the extent that pornography depicts adults engaging joyfully in sexual conduct without marriage, privacy, or a hint of romance, it asserts the moral appropriateness of such behavior. Likewise, those feminists who critique it for eroticizing sexual inequality recognize that it is quintessentially political in its depiction of the distribution and use of power in social relationships. These statements in no way imply our endorsement of or opposition to these ideas, but merely demonstrate that it is the very ideas communicated in sexually-oriented material which serve as the primary justification for attempting to ban it.

Moreover, we strongly dispute the notion that "obscenity" laws have no spillover effect on protected speech. The Attorney General's Commission on Pornography labelled the expressed fear of booksellers, librarians, film-makers, and authors to this effect a "phantom danger". Yet censorship is no phantom, but a very real deterrent to free expression, and one which becomes more real every time there is a new attempt to remove Catcher in the Rye from a school library or edit the schoolroom version of Romeo and Juliet. If the Supreme Court can affirm that certain ill-defined "obscene" materials can be excluded from the category of protected speech, who is to blame the local decency group for pushing to get R-rated films off cable television or trying to get the new Judy Blume novel removed from the library because of the need to protect children or adults from the allegedly "wrong" attitudes these works may foster in the minds of some? Obscenity laws tend to justify a censorial mindset.

I will focus the remainder of my remarks on two areas. First, I believe that with 32 federal obscenity and child pornography statutes on the books, there has been no real demonstration of need for new law enforcement approaches. Indeed, in my view, neither the findings of the Attorney General's Commission on Pornography nor any other events have provided a basis for concluding that pornography is a serious national problem or that new laws are needed at the federal level. Second, I would like to address some of the specific provisions in S.2033 which we feel represent particularly egregious intrusions into the privacy and First Amendment rights of adult Americans. Indeed, even if one has no philosophical objection to "obscenity" laws in general, many of the provisions in S.2033 are so extreme that they should be rejected on prudential grounds.

## The Pornography Commission: No Basis For Sweeping New Initiatives

It is our view that the findings of the Attorney General's Commission on Pornography do not support the need for or wisdom of enactment of new obscenity provisions. However, the Justice Department analysis of this bill regularly invokes the conclusions of this Commission as if they were holy writ. To the contrary, it was a body with an articulated mandate which essentially assumed the invalidity of the 1970 Commission on Obscenity and Pornography's recommendation that most obscenity laws be repealed. The new Commission had no funds to authorize original research, no subpoena authority to demand that witnesses appear, and little interest in or capability of probing beneath the surface of most witnesses' claims. In innumerable instances, its final Report relied on the unquestioned testimony of a single witness for its conclusions on complex matters of finance, law, or science. Scientific data purportedly provided "significant" support for the Commission's conclusions about "harms" of pornography. Curiously, though, the Report shows a studied unwillingness to link specific social science studies to specific findings, or to reveal just what balance was struck between social science and other, "non-scientific" information, particularly stories from a parade of "victims" of pornography. Materials which presented alternative viewpoints, reached conclusions not consistent with the presuppositions of the Commission, or simply demonstrated that the same "effects" ascribed to pornography are generated by other media expressions were suppressed or ignored.

Rather than clarifying the issues for Americans, this body has largely polluted the debate over sexually explicit material in our culture. It attempted to breathe new life into the archaic construct of "obscenity" law by applauding the most dangerous reasoning of all to suppress speech--that it generates "bad attitudes", in this case offensive ones about the status of women and the nature of womens' sexuality. When our nation abandons the view that offensive imagery and ideas are not best handled with alternative, affirmative, "corrective" speech and turns instead to government censorship, we are all the losers. The Commission also tried to extrapolate from a few modest social science experiments a theory of causation of sexual violence from exposure to certain forms of pornography. This did a disservice to the integrity of the limited scientific data available, a disservice subsequently condemned by most of the key researchers whose work was cited by the Commission. Moreover, the gaps in science were filled in by a legion of the Commissioners' own biased preconceptions and intuitions, bolstered by some gestalt derived from the voices of alleged "victims" and the images in a dozen horrific slide-shows. In sum, the methodology utilized by the Commission was so flawed that its conclusions and recommendations do not lend credible support for the need for sweeping new law enforcement initiatives.

## Section - By - Section Analysis

What follows is a section-by-section analysis of the most serious constitutional and policy problems with the legislation.

Section 101:

This provision merely adds to existing law a prohibition against disseminating child pornography or the advertising of child pornography via computer. Although in theory one could distribute a computer generated picture of an actual minor engaged in sexual activity, this does not appear to be an actual problem. Indeed, the Justice Department analysis of the bill merely indicates that it is theoretically possible for this to occur.

It would be more appropriate to enact carefully crafted legislation to prohibit the planning of kidnappings or other unlawful exploitation of minors over a computer. Indeed, this is where we think the major focus for fighting child sexual exploitation should lie: in stopping the production of this material in the first place, rather than in criminalizing its subsequent distribution and receipt. The latter tactic represents a sad case of law enforcement which is too little, too late.

Section 102:

The ACLU has no objection to a prohibition against parents, guardians, or other custodians selling or transferring custody of dependent minors for unlawful purposes. This statute, though, is extraordinarily narrow, making it a crime to sell a child only if the sale is for use in child pornography. It seems to be a dramatic example of missing the forest for the trees. Treating children like chattel, for any purpose, pornographic or otherwise, may be an appropriate subject for federal intervention. However, such conduct transcends the arena of pornography.

Section 103:

The recordkeeping requirements in this section are unduly burdensome. Essentially, it would require the producer of any publication which contains one or more depictions of actual sexually explicit conduct to create and maintain individually identifiable records for each person portrayed engaging in or assisting such conduct. Unless the conduct, however, fits within the legal definition of obscenity or child pornography, there is nothing unlawful about depicting actual sexual conduct. This is constitutionally protected speech, whether it is in a medical textbook or an adult videotape. Even the Justice Department analysis obliquely appears to recognize this by noting that "depictions of actual sexually explicit conduct may very well meet the definition of obscenity...[emphasis added]". On the other hand, as local prosecutors as well as the Justice Department knows, there are many instances where depictions of actual sexual conduct are deemed "not obscene" by local judges and juries all over this nation.

In our view, the requirements are an unconstitutional, content-based impediment to the production of what must, therefore, be presumed to be constitutionally protected speech. If there is no federal record keeping requirement for the people portrayed in Road and Track, or "Star Wars" there can be no such requirement for Hustler or "Debbie Does Dallas." The statute does not merely require that a producer have on record a basis for determining the age of the individual, but mandates that he also ascertain other names (including maiden names and aliases) and "such other identifying information as may be prescribed by regulation". Presumably, this statute is aimed in part at being able to locate persons who are depicted, which suggests that "other identifying information" could include address or telephone number. There is simply no justification for requiring this level of disclosure for the production of presumptively lawful materials.

In our view, the statute is not salvaged by the provision that this identifiable information may not be used "as evidence against any person with respect to any violation of law". The Justice Department notes that this "is constitutionally required to sustain the validity of the recordkeeping requirements" and relies on U.S. v. Freed 401 U.S. 601 (1971). However, Freed upheld certain recordkeeping requirements in regard to the transfer of handgrenades. Since the Supreme Court has never upheld the constitutional right to possess firearms, much less grenades, there was no inhibition of the exercise of a constitutional right by requiring purchasers to disclose identifying information. Here, however, if the model choose not to give this information, the publication would not occur. These requirements, then, are a highly significant discouragement to the production of all sexually-oriented material produced for any purpose. This problem is exacerbated since the Justice Department insists that failure to keep these records is a violation of 18 U.S.C. 1001, furnishing of false information to a government official.

This problem is then compounded by creating a rebuttable presumption that if the records are not kept, a performer is in fact a minor in violation of Section 2251(a) of Title 18, and that indeed all other performers in the matter were also minors. It seems to be more sensible to couch some ascertainment of legal age as an affirmative defense to prosecution under all sections of the Child Protection Act.

Similar presumptions are present in regard to Section 2252, prohibiting interstate transportation, mailing, or distribution of a visual depiction of a minor engaged in sexually explicit conduct. Under the proposal, if the matter did not contain a statement describing where the records could be examined, it would be presumed that everyone depicted therein was a minor. This is again an unfair and unconstitutional shift in the burden of proof to the producer of presumably lawful material.

Since these recordkeeping requirements are imposed in regard to any picture taken within the last twenty-five years, the chilling effect is even greater. A video retailer, for example, would be very nervous about distributing any film made prior to the year this provision went into effect, because it would lack the necessary certification and would open the retailer to all the mischief worked by the presumption that all models in the film were minors.

Section 104:

This provision would make the provisions of the Child Protection Act predicate offenses under the Racketeer Influenced and Corrupt Organizations statute. (RICO), 18 U.S.C. 1961 As you are aware, a case on whether obscenity as a predicate under state RICO statutes acts as a prior restraint will be argued next fall before the United States Supreme Court; in Fort Wayne Books Inc. v. Indiana. Although it could be argued that child exploitation is more obviously a crime than disseminating obscenity, the scope of forfeiture under these statutes would arguably be even broader than under the obscenity laws. Section 2252(a)(2) of the Child Protection Act makes "receipt" of the material a crime. Would this mean that any person convicted of the requisite RICO predicate offenses would have the place of receipt (his business, her home) subject to seizure because it was the locus of the receipt of the proscribed material? We believe it is time for Congress to look at narrowing the items subject to forfeiture in these complex First Amendment cases, not expanding them. At the very least, it would be prudent to await the decision in Fort Wayne Books before including more speech-related crimes under RICO.

Section 201:

The provision in Section 201(a) would make it a crime to "knowingly receive or possess with intent to distribute any obscene" item which "has been shipped or transported in interstate or foreign commerce" at any time, even prior to enactment of this statute. It does not contain any "commercial purpose" limitation, and indeed the Justice Department memorandum in support of this legislation specifically notes that it could reach even the "consumers of obscene material who also sell it or offer it for sale or transfer". If, for example, two neighbors routinely trade magazines from their personal collection of adult material, they would be liable for possible prosecution and two years imprisonment in a federal penitentiary under subsection (a) of this act. Further, the Department intends that the word "knowingly" mean only that the person must intend to act to receive the material in question and know of its general contents, not that he know it is obscene.

Essentially, this section would make virtually everything which is now a state or local obscenity violation, a federal crime. It does so by a presumption in Section 1469 (a) that material was "transported, shipped, or carried in interstate commerce" if the matter was produced in one state and is subsequently located in another state. This eviscerates the requirement in current law that interstate transportation must be demonstrated by the prosecution in an affirmative manner. This vast expansion of federal jurisdiction is particularly unwise since the very gravamen of obscenity offenses is that the materials violate local community standards. Miller v. California and its progeny wisely hold that there is no "national standard" for obscenity. It is precisely the meaning of Miller's "community standards" concept that no national arbiter, but rather the local community, will determine what is sufficiently "patently offensive" to be regulable.

This section of S.2033 radically alters the existing, and quite sufficient, balance of federal and local powers over obscenity. It is particularly unwise public policy to grant to the federal government the power to reach conduct of this sort which is not criminal under state law. Recently in Hawaii, for example, the state Supreme Court in Hawaii v. Kam (January 8, 1988) ruled that the Hawaii Constitution protects the intrastate distribution of so-called "obscene" material on privacy grounds. Rejecting what are crabbed decisions by the United States Supreme Court which protect the right to possess obscenity, but not to receive it in public places, the Hawaii court found that the will of the people of the state of Hawaii was to "give each and every individual the right to control certain highly personal and intimate affairs of his own life" absent a "compelling state interest". The court found no such compelling interest in obscenity cases and concluded that: "[I]t is obvious that an adult person cannot read or view pornographic material in the privacy of his or her home if the government prosecutes the sellers of pornography...and consequently bans any commercial distribution". Wise or unwise, it is inappropriate to give the federal government greater power to make it difficult to obtain this material from outside the state. It is bad enough that a federal grand jury sitting in Hawaii is now considering indictments against a firm in another state which sold an undercover officer a tape and mailed it to Hawaii. It would be worse to make that prosecution easier by removing the requirement of proof of interstate transportation.

Hawaii is not the only state to have reached this wise conclusion. The Oregon Supreme Court reached a similar result on free speech grounds in State v. Henry 302 Or. 510, 732 P.2d 9 (1987) Likewise, in 1986, the voters of Maine rejected a referendum to enact a state obscenity law by a 2½ - 1 margin.

Moreover, when Congress has decided to federalize a crime, it has generally done so after there is a substantial record of national harm. This is why, for example, statutes regulating labor racketeering and firearms distribution are based on a documented record that certain activities have an adverse affect on interstate commerce or some clearly articulable national interest. In our view, there is no record from the Pornography Commission, or elsewhere, of an adverse affect on interstate commerce from the distribution of obscene material. Recall that these materials are regulated under the Miller test not because they are "harmful", but because they are "offensive" in a particular locality. Moreover, there is little chance that transporting a box of videotapes or an envelope of magazines will involve any person other than the shipper and the receiver in even seeing the material and being offended.

Section 201 also contains a provision which enhances the penalties if the person is "engaged in the business" of selling or transferring obscene matter. It is presumed that there is a business connection if the individual offers to sell or transfer five or more obscene items. This means that if one neighbor mentioned above is cleaning out his basement and offers all five of the most recent issues of Hustler (which has on occasion been found legally obscene in some jurisdictions) to his neighbor, he must rebut a presumption that he is in the obscenity business. This is an unacceptably low standard.

This section also creates a new offense for using a "facility or means of commerce for the purpose of interstate or foreign sale or distribution of obscenity". It would thus be a crime merely to drive a truck transporting "obscenity" on a federally numbered highway even if the travel was strictly within a single state, if it could be demonstrated that in any way some of the material would later be transported to another state or country.

Similarly broad is the amendment to the Interstate Transportation in Aid of Racketeering Statute (ITAR), adding "obscenity" as a predicate offense. It would thus be a crime for a magazine wholesaler in one state to telephone a retailer in another state offering a magazine as part of an order if it is subsequently determined that the magazine is obscene. In our view, there is constitutionally mandated distinction between materials presumed to be protected under the First Amendment and other items involved in other ITAR offenses such as arson, gambling, and narcotics. Bluntly, a book distributor who makes the wrong judgment about the lawfulness of a book about sex cannot be judged the same as a person who uses the telephone to order flammable materials to destroy an orphanage.

Section 202:

This section amends Title 18 to permit extraordinarily broad forfeiture collateral to convictions under federal obscenity statutes. As you know, obscenity is currently a predicate offense under the RICO statute. RICO permits forfeitures akin to those found in this proposal, but in those cases there has at least been a record of prior unlawful activity. This section invokes these Draconian sanctions even the very first time that a bookdealer or video rental shop operator transfers an item later determined to be obscene. The obscene material may be seized, of course, but then in addition, "any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense" as well as "any property, real or personal, used or intended to be used to commit or to promote the commission of such offense." What does this include in the case of, say, an average video dealer? It appears that all property in the store purchased subsequent to the first rental of the obscene video could be seized under the theory that the rental proceeds went toward the purchase of future inventory and was thus "traceable...to other proceeds obtained from such offense." In effect, the Walt Disney version of Pinnochio is seized along with the Erotic Adventures of Pinnochio. Moreover, all the fixtures in the store are seizable since they were used to "commit" the offense, or at least to "promote" it. This would include everything from the display racks to the lights which make it possible for customers to read the box labels. If the records of the business are kept on a computer located in the owner's personal residence, it would no doubt be argued that both the computer and the home would also be subject to seizure. Indeed these were essentially the arguments used by the Justice Department to attempt forfeiture in the Pryba case in Northern Virginia of the couple's residence and motor vehicles. Wisely, the jurors found this claim extreme and did not deem the property forfeit.

It is hard to imagine a more chilling prospect for the average newsstand operator in New Jersey, or video store operator in Ohio, or book chain manager in Pennsylvania than to know that his entire stock may be seized if he sells the wrong magazine to the wrong person in the wrong place at the wrong time.

Forfeiture in this area is wrong for several reasons. First, in pushing for forfeiture, the preoccupation of the Pornography Commission was not with merely depriving criminals of the means to repeat their crime, but with boosting the deterrent impact of existing law on those who would violate it in the future. Insofar as deterrence is a goal of punishment, the legislation ignores court decisions which consider forfeiture to be a denial of constitutional due process when invoked solely to punish. See, for example, United States v. One Assortment of 89 Firearms, __U.S.__, 104 S. Ct. 1099 (1984)

Forfeiture was initially intended to reach the instrumentalities of the crime: seizing not only the counterfeit money but the etching plates to produce more of the same. That was sensible and reasonable. Moreover, federal courts construing current forfeiture law in regard to materials which do not raise First Amendment issues, hold that property is forfeit only upon proof of a "substantially significant connection" with the criminal activity. See, for example, United States v. $88,500 671 F.2d 293 (8th Cir. 1982); U.S.V. One 1972 Datsun 378 F.Supp. 1200 (D.N.H. 1974) (These are cases dealing primarily with forfeiture of property used for illegal purposes and not property purchased with profits from illegal ventures.)

In our view, the forfeiture sections of this bill represent classic prior restraints of speech and are unconstitutional under the standards of Near v. Minnesota 283 U.S. 697 (1931). They will have the practical result of seizure of materials which have not been adjudged, or even alleged, to be obscene, along with seizure of the neutral instrumentalities for the dissemination of presumably constitutionally-protected speech. As the Supreme Court noted in Schad v. Borough of Mount Ephraim 452 U.S. 61, at 68 (1981): "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed". The right here is the continuance in the business of communication by the sale or rental of books, magazines, or videos. It is the loss of the constitutional right to distribute, with a drastic collateral effect on the First Amendment right of adults to have access to controversial materials about sex.

The ACLU does not approve of the use of RICO in obscenity cases for many of the reasons articulated in the district appeals decision in 4447 Corporation v. Goldsmith 479 N.E. 2d 578 (Ind. App. 4 Dist. 1985), rev'd 504 N.E.2d 559 (Ind. 1987), cert. granted 56 USLW 3608 (1988). Nevertheless, in those cases there is the colorable claim that there is a compelling demand to stop corrupt enterprises from continuing. Here, there is only a desire to stop a bookstore from making a second "mistake" in regard to whether a book was unlawful by putting it out of business after the first one.

The purpose of these civil and criminal forfeitures is to put these persons out of business for a long time; to stop them from communicating. It is therefore distinguishable from other forfeiture provisions which do not affect communication such as those in 21 U.S.C. 853 regarding forfeiture in controlled substances cases. Persons engaged in selling narcotics can claim no First Amendment interest. In addition, they know they are engaged in an illegal act. In obscenity prosecutions, forfeiture carries an extraordinarily heavy First Amendment implication, and it is invoked against people who do not know they are trafficking in "obscenity" until a court tells them so after the fact.

This provision is quite similar in its effect to the kinds of statutes declared unconstitutional in many other seizure contexts. For example, in *Nihiser v. Sendak* (N.D.Ind. 1974) 405 F. Supp. 482, *aff'd* 431 U.S. 961 (1977) the court ruled unconstitutional a statute which authorized the removal of personal property from the premises of a bookstore or theater after it was closed for violation of obscenity laws. *See also*, *State v. A Motion Picture Entitled 'The Bet'* 547 P. 2d 760 (Ks. 1976) ("Items of neutral equipment which may be used in the future for legitimate forms of expression, such as movie projectors and theatre seats, may not be destroyed because of past transgressions of obscenity laws.") It has the same constitutional infirmities as statutes which provide restrictions on future communications business activity, *Genusa v. City of Pecria* (7th Cir. 1980) 619 F.2d 1203, or revocation of a business license based on obscenity convictions, *Gayety Theatres, Inc. v. City of Miami* (11th Cir. 1983).

The Justice Department acts as if these concerns are non-existent, apparently viewing these forfeitures as simple content neutral, *in rem*, penalties. This is a false characterization. The purpose as well as the effect is to restrict future speech. It is clear that the Pornography Commission and many of the proponents of this legislation want these bookstores closed down, and believe these forfeiture provisions will make it easier to do so.

No contrary result is demanded by Arcara v. Cloud Books, Inc. __ U.S.__, 92 L. Ed. 2d 568 (1986) which held that the First Amendment did not bar enforcement of an order closing a bookstore because the closure was directed at imposing sanctions for use of the store for prostitution. As Justice O'Connor noted in her concurrence: "If, however, a city were to use a nuisance statute as a pretext for closing a book store because it sold indecent books... the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review."

We also strongly object to subsection (e) which amends the Tariff Act to effectively permit the prosecution of imported "obscene" materials not only at the port of entry, but at "the district of the addressee's residence."

Section 203:

This provision is designed to strengthen existing law regarding obscene programming on cable television and through subscription television (microwave and satellite distribution). It is predicated upon findings which include the following: "The harm caused by obscene television programming combined with the interstate nature of such programming requires that the Federal government must assist the States in their efforts to combat it." This finding is purely speculative on almost every front. First, it is made notwithstanding the absence of any prosecution or attempted prosecution at any level against a cable operator or an operator of any subscription television service. At the time of the deliberation of the Pornography Commission, only a single operator in a Pennsylvania cable system was even carrying unedited X-rated movies. He has apparently stopped for business reasons. On the other hand, the edited versions of initially self-imposed X-rated movies shown on such services as "The Playboy Channel" would not be deemed legally obscene in any jurisdiction. Second, there is no reported "harm" from cable television. Third, I am aware of no statements from local or state governments demanding a larger federal role in dealing with what is a non-existent problem.

Even if obscene cable television programming existed, there is no demonstrable basis for concluding that existing statutes would not already proscribe its interstate distribution. See 18 U.S.C. 1462, 1465. Purely intrastate programming is not a legitimate federal concern.

What is clear is that Congress in passing the Cable Policy Act of 1984 did not intend to hold a cable operator liable for "obscene" or otherwise unprotected material which was, for example, disseminated on a statutorily required "access" channel, whether that was a public access channel or one which was leased by a commercial enterprise. Congress did not in 1984, and should not in 1988, impose a burden of pre-screening censorship on every program which is distributed over a cable system. 47 U.S.C. 558 does exempt cable system operators from liability for carrying obscene programming over either public or commercial access channels. We feel this is the way the law should remain, but

S.2033 seems to seek a contrary result. The Justice Department analysis notes: "in the case of a local cable operator it would be sufficient [for prosecution] to show that the operator knew a movie contained explicit visual depictions of sexual acts, and not that the operator know it was obscene". This kind of screening and censorship requirement, with attendant criminal liability, will dampen interest in access programming and impose new burdens on that process. As usual, the analogy used by the Justice Department between the adverse effect of loansharking on interstate commerce and that of cablecasting obscene material (an act which I remind you does not exist) is disingenuous. If a film was produced in and cablecast in only one state there is absolutely no effect on interstate commerce, except perhaps to attract visitors who desperately want to see that film.

Section 204:

Enactment of this provision seems unlikely since both Houses of Congress have passed a total ban on so-called "dial-a-porn" services. It remains the position of the American Civil Liberties Union that such a prohibition of "obscene or indecent" services to adults is unconstitutional. We believe that the only practical, effective, and constitutionally acceptable solution to the problem of minors' access to such services lie with technologically feasible requirements on carriers and message providers which will act to discourage unwarranted access. These measures, which we have endorsed before the Federal Communications Commission and the House Telecommunications

Subcommittee could include: mandating provision of blocking devices either at the home premises of subscribers or through central switching at the telephone company facilities; requiring that carriers disconnect unwanted services of any kind; or mandatory disclaimers which disclose the extra charges for such services). It is our hope that Congress will revisit these real solutions after the statute enacted last week is declared unconstitutional by the courts.

The provision in S.2033 which would seek to regulate indecent communication to minors would not withstand constitutional scrutiny. The Second Circuit has already stricken a provision in the Communications Act which attempts to regulate this material. Carlin Communication v. F.C.C. (Jan. 15, 1988). The Court noted that a ban on indecency is fatally flawed because, as with cable television, there are alternative means of keeping this material away from children.

Section 205:

This provision criminalizes the sale or possession with intent to sell or even the simple possession of an "obscene visual depiction or a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct" within the special jurisdiction of the United States, any land or building used by the federal government, or Indian territory.

Notwithstanding language that acknowledges that possession of an "obscene visual depiction" (of adults) "in any place where such person lives or resides" cannot be an offense, the provision nonetheless makes it a crime for a government employee to possess an obscene video tape in his or her desk drawer while awaiting lunch hour to return it to the video store or for a member of the United States military to have an obscene magazine in the backseat of his or her car while returning home to the barracks on a military base.

The acknowledgment that possession in one's residence may not be criminalized is based on the decision in Stanley v. Georgia 394 U.S. 565 (1969) which holds that mere possession of obscenity (under the facts of the case, in the home) cannot be punished. However, the proposal seems to misunderstand what is at the heart of Stanley: that non-commercial private use is protected. Notwithstanding post-Stanley decisions which permit prosecution of obscenity, these cases relate to prohibitions against the commercial distribution of an item, and cannot be read as permitting roadblocks to check out every item in a car enroute to a person's home. Stanley means nothing if it does not mean that people are protected as they personally transport items to their residence.

Section 206:

This provision adds obscenity to the list of crimes for which the government may seek court-ordered wiretaps or other electronic surveillance. This raises the possibility of widespread scrutiny (perhaps even including surreptitious videotaping) of citizens who purchase sexually-oriented materials. As we have noted earlier, all of these materials must be presumed to be constitutionally protected until otherwise determined. Electronic surveillance of those dealing in communicative materials is a particularly inappropriate and intrusive investigative tool. The problem is, of course, escalated by the creation in S.2033 of new crimes which affect "consumers" of this material.

## S.703: Pornography Victims Protection Act

S.703 is an effort to extend the framework of the Child Protection Act to cover certain production and distribution of sexually-explicit material featuring adults. It would criminalize the conduct of any person who "coerces, intimidates, or fraudulently induces an individual 18 years or older to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" if interstate transportation of the material is anticipated. In addition, it would make it a crime to "knowingly transport or ship in interstate commerce..." or even "knowingly receive" any visual depiction if its production "involved the use of an adult who was coerced, intimidated, or fraudulently induced to engage in sexually explicit conduct and the person knows or has reason to know that the adult was coerced, intimidated, or fraudulently induced". The bill also expands civil remedies in existing law by permitting the district courts to prevent and restrain violations of the law by ordering divestment of business interests or imposing restrictions on future activities or investments "including prohibiting such person from engaging in the same type of legal or business endeavor". Victims of violations of the statute "who suffer physical injury, emotional distress, or property damage" may recover treble damages. It should be noted that this proposal does not even require that the material produced be legally obscene, but speaks merely of depictions of "sexually explicit conduct".

This legislation seems predicated on the view that there is a substantial problem of the coercion in the production of pornography. Notwithstanding a very few well-publicized cases, including that of Linda Marchiano, even the Attorney General's Commission on Pornography found little new evidence of this phenomenon. Aside from physical coercion, the proposed statute also criminalizes production based on "intimidation", "fraudulent inducement", and perhaps non-physical forms of "coercion" (psychological or economic). These undefined actions, of course, could be read to include a vast array of conduct on the part of photographers, magazine publishers, or filmmakers. Is it "fraudulent inducement" to suggest that an appearance in a pornographic film could lead to more "legitimate" film roles? Is it "intimidation" if an actor or actress accepts a role in a pornographic film because he or she is "intimidated" at the prospect of having no other source of income?

Actions which may have appeared reasonable to a model at the time they were undertaken could, years after the fact, be recharacterized as having resulted from "intimidation" or "fraudulent inducement". Even the threat of such actions based on undefined standards like "intimidation" or "coercion" would have a chilling effect on the production of sexually-oriented material, including mainstream motion pictures and magazines.

Such a chill is even more likely because the proposed statute notes that even proof "that the person knew that the purpose of the acts or events in question was to make pornography" or that the "person signed a contract to produce pornography" would not alone "negate a finding of coercion". This construction seems to parallel the far more reasonable assumption in the Child Protection Act that there is no meaningful consent in the production of most child pornography. However, it is an unduly paternalistic approach to dealing with adults.

It is useful to note that there are existing avenues of redress open to persons whose photographs have been taken or used without their permission. Although not without constitutional difficulty, many jurisdictions recognize privacy-related torts, through common law or statute, which could provide relief for those actually coerced into the production of photographs, pornographic or otherwise.

Indeed, there is already some case support for "misappropriation" actions involving pornography. One model obtained damages for emotional distress and lost earnings where the wrongful use of nude photographs by one low-circulation publication made publication in a more well-known magazine impossible. Clark v. Celebrity Publishing Inc. 530 F. Supp. 979

(S.D.N.Y. 1981). The same court refused to allow recovery where an actress had agreed to a partial nude scene in a non-pornographic film but then objected to the republication of a frame in High Society. Ann-Margaret v. High Society Magazine, Inc. 498 F. Supp. 401 (S.D.N.Y. 1980). In these cases, the court implicitly drew a well-founded distinction between compensation for wrongful activity (theft of pictures) and compensation for a person's prior bad judgment.

In summary, we find S.703 to include dangerously vague standards which could result in the suppression of even constitutionally-protected material years after it was created.

## Conclusion

In conclusion, we urge that you do not enact the current version of S.2033, or S.703. Instead, we would ask that you focus the attention of this Committee on those aspects of S.2033 which relate directly to the abuse of children and seek meaningful ways of dealing with this at the federal level. Indeed, this might also prove a useful time to consider whether the current framework of broad powers given by Congress over obscenity should not be narrowed, particularly in regard to inclusion of "obscenity" related offenses under RICO.

# HEARING QUESTIONS
BY SENATOR CHARLES E. GRASSLEY
JUNE 8, 1988
PANEL III

I'D LIKE YOU TO COMMENT ON SECTION 103 OF BOTH S. 2033 AND S. 2021, REGARDING RECORD KEEPING REQUIREMENTS. AS YOU KNOW, S. 2033 WOULD REQUIRE RECORDS OF THOSE WHO PRODUCE SEXUALLY EXPLICIT MATERIAL GOING BACK 25 YEARS, WHILE THE REQUIREMENT IN S. 2021 TAKES EFFECT, GENERALLY, 180 DAYS AFTER ENACTMENT OF THE BILL. WOULD YOU DISCUSS THE MERITS OF RECORD KEEPING IN GENERAL ?

CAN YOU EXPAND UPON THE CONSTITUTIONAL ARGUMENTS AGAINST THE RECORD KEEPING REQUIREMENT IN S. 2033 AND EXPLAIN WHY YOU BELIEVE THAT THIS SECTION WILL NOT WITHSTAND CONSTITUTIONAL SCRUTINY ?

WOULD YOU COMMENT ON THE PROSPECTIVE APPLICATION OF THE RECORD KEEPING REQUIREMENT CONTAINED IN S. 2021 ?

RESPONSE TO QUESTIONS FROM SENATOR GRASSLEY

You have raised a number of questions regarding the recordkeeping requirements in S. 2021 and S. 2033. Clearly, the requirements in S. 2021, which are prospective only, raise fewer constitutional issues and, in a collateral matter, are less burdensome on the distribution of materials which our system must assume are constitutionally protected unless otherwise determined by a judge or jury.

Aside from the issues raised in my testimony about the constitutional infirmities in S. 2033, it is also important to recall that the retroactive recordkeeping covers a period in which non-obscene child pornography was not unlawful (at least on the federal level). It is highly unlikely that any court would allow a presumption that a model was a minor for material produced when there was not simply the absence of a recordkeeping requirement, but when distribution of the picture was itself a lawful act.

Notwithstanding the superiority of the provision in S. 2021, it is hard to avoid the constitutional problem of having the recordkeeping requirement apply only to "visual depictions of actual sexually explicit conduct", particularly when that term "conduct" is later defined to include "exhibition of the genitals" (that is, certain forms of simple nudity). Unless the material is obscene, there is no legal distinction between pictures of intercourse and pictures of four wheel drive vehicles. I do not believe that the concept of equal protection permits the imposition of this burden only on those who are producing certain kinds of visual depictions.

Notwithstanding the argument that there is a compelling government interest in protecting against the exploitation of children, the recordkeeping requirement tied to presumptions that if the records are absent "every performer in the matter was a minor" is certainly extreme. Obviously, a producer could present expert testimony from physicians as to their opinion about the age of persons for whom records were not kept, but it seems unduly burdensome to force such a factual dispute into the courts every time there is a simple allegation that material is "child pornography". Before the prosecution makes such an allegation, I think it is appropriate and, indeed, constitutionally required that it proffer evidence that the model is in fact younger than eighteen.

Senator **DeConcini**. Thank you, Mr. Lynn.
Mr. Klein.

## STATEMENT OF GEORGE R. KLEIN, PRESIDENT, GEORGE R. KLEIN NEWS, AND PAST CHAIRMAN, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, CLEVELAND, OH

Mr. **Klein**. My name, as you have mentioned, is George Klein, and I am president and owner of the George R. Klein News Company in Cleveland, OH, which is a wholesale distributor of magazines, newspapers, and paperback books in the northeastern part of Ohio. I am also a partner in several other similar companies in Texas, California, Florida, Idaho, Oregon, Alaska, and Phoenix, AZ. I am also the past chairman of the Council for Periodical Distributors Associations, which is a trade association of approximately 400 wholesale distributors who operate throughout the United States in a similar way to which we operate in northeast Ohio.

The current chairman, Buddy Moman, of Tuscaloosa, AL, was not able to attend today, so I am sitting in his place.

I appreciate the opportunity to tell you briefly about the people who we represent and also about our views on some of this legislation.

Regarding the proposed legislation, our association would like to assure you that we have no reservation at all regarding the sections dealing with child pornography. We support that legislation.

Our concern about this bill is solely with the part that addresses obscenity, and the possibility that wholesalers and retailers will remove constitutionally protected books and magazines from public sale as a result of this legislation for the following reasons:

Number one, the legislation as it is drawn would have a chilling effect on the magazine and book distribution industry because it makes it a crime just to receive any materials that might be later deemed to be obscene.

Number two, the broad forfeiture provisions of the statute could seriously disrupt the entire distribution system which we have in effect today.

Number three, the extension of the Federal Government into areas where wholesalers have traditionally cooperated with State and local authorities could only harm a system which has worked well to preserve the community standards set up by the Supreme Court.

CPDA's members, or wholesalers like myself, receive mass market publications from national distributors representing publishers. We distribute those materials to local retailers who in turn sell them to the public. CPDA wholesalers distribute the majority of the mass market magazines sold at retail in this country. We deliver publications like TV Guide, Woman's Day, Family Circle, Time, Life, et cetera to more than 170,000 retailers, such as supermarkets, drug stores, convenience stores, airport terminals, et cetera. The typical CPDA wholesaler handles over 2,500 different magazine titles each month and nearly 5,000 new book titles each year.

Practically speaking, our companies cannot regularly screen the editorial content of the thousands of different books and magazines which we receive each month. With these realities in mind, the legislation under consideration poses a number of serious problems for our industry. If the bill is enacted in its present form, fear of Federal involvement is likely to cause wholesalers and retailers to err on the side of caution by dropping whole categories of publications, including much that is constitutionally protected.

Yet, as I have described, our member wholesalers regularly receive in their warehouses thousands of publications, some of which we decide not to distribute because of sensitivity to our local communities. Despite the community responsibility that we try to exercise, under the proposed law we could be prosecuted for just having received and held the material that was later deemed to be obscene, not even having distributed the material.

The mass market distribution system for magazines and books is designed to make information available to the public as widely and quickly as possible. The publisher decides in advance of publication what is shipped to each individual wholesaler. The wholesaler decides in advance of having received the publication what in turn will be shipped to each individual retailer. Neither the wholesaler nor the retailer really order what they receive, nor do they know in advance what is in those publications.

Consider the case of a supermarket that receives its regular supply of Cosmopolitan, Elle, or Glamour or some other magazine, only to find that an issue has been judged by local community standards to be obscene because of some content of editorial or advertising. The proposed legislation, as written, could result in the possible forfeiture of the entire assets of that store.

I certainly doubt that is the intent of the legislation. However, that is the net effect.

A wholesaler or retailer convicted of handling obscene material could be made to forfeit not only obscene material, but also any other inventory or any item used in the distribution of that material, like our delivery trucks, our computer systems, the store's fixtures, the store's cash register, their computer systems, et cetera.

If the enforcement provisions were enacted in any of these situations, the result would be the complete disruption of distribution of all mass market magazines sold by the affected wholesaler or retailer, in effect shutting down the entire distribution system.

It is our firm conviction that in its effort to protect Americans from obscenity, this legislation would have the wholly unintended actual effect of significantly limiting the availability of reading material to people throughout our Nation. As I stated earlier, we support the parts of the bill dealing with child pornography. However, we urge you to eliminate those portions dealing with obscenity.

Thank you.

[The prepared statement of Mr. Klein follows:]

CPDA COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS
60 East 42nd Street, Suite 2134, New York, NY 10165 • 212-818-0234
President: JOHN M. HARRINGTON

**Testimony of George R. Klein**

**Past-Chairman of CPDA,**

**before the Subcommittee on Patents**

**Copyrights, and Trademarks**

**of the Judiciary Committee**

**United States Senate**

**June 8, 1988**

My name is George Klein. I am president of George R. Klein News in Cleveland, Ohio, which is a magazine and paperback book distribution company. I am also a partner in several other similar companies in Texas, California, Florida, Idaho, Oregon, Alaska, and Arizona. I am also a past chairman of the Council for Periodical Distributors Associations, a trade association representing nearly 400 magazine and book wholesale distributors throughout the United States. I appreciate the opportunity to tell you briefly about the people whom I represent and about our views on the legislation before you.

Regarding the proposed legislation, "The Child Protection and Obscenity Enforcement Act," our association would like to assure you we have no reservations at all regarding the sections dealing with child pornography. In fact, CPDA and Americans for Constitutional Freedom, a group with which we are affiliated, on several occasions have stated our support of efforts to combat this problem.

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CHAIRMAN-ELECT: Brian L. [illegible], Periodical Management Group, Box 7025, San Antonio, TX 78207
SECRETARY TREASURER: Harry J. Tobias, Interstate Periodical Distributors, Inc., 201 East Badger Road, Madison, Wisconsin 53713
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CPDA is the international association of local independent wholesale distributors of magazines, paperback books, and newspapers in the United States and Canada

Our concern about this bill is solely with the part that addresses obscenity -- and the possibility that mainstream wholesalers and retailers will be forced to remove constitutionally protected books and magazines from public sale for the following reasons:

1. It could result in the creation of a chilling effect on the magazine and book distribution industry because it makes it a crime to receive any obscene materials.
2. The broad forfeiture provisions of the statute could seriously disrupt the entire publishing distribution system.
3. The extension of the Federal Government into areas where wholesalers have traditionally cooperated with state and local authorities could only harm a system which has worked to preserve community standards.

CPDA's members receive mass market publications from national distributors representing publishers. We distribute those materials to local retailers who in turn sell them to the public. CPDA wholesalers distribute virtually all of the mass market magazines sold at retail in this country. We deliver publications like TV Guide, Readers Digest, Family Circle, Woman's Day, Time, and Newsweek to more than 170,000 retailers, such as supermarkets, drugstores, convenience stores, bookstores, terminals, and anywhere else magazines may be sold. The typical CPDA wholesaler handles over 2,500 different magazine titles and nearly 5,000 new book titles each year.

In performing our job, magazine wholesalers take pride in the service they provide to their communities and the role they play in fulfilling the protections provided in the First Amendment. We supply Americans with the publications that inform and entertain them, and we supply them with the publications they have demonstrated through their purchases that they want.

Most CPDA wholesaler agencies are family-owned and operated businesses. Many of the family-owners of the companies have been in the business for several generations, giving us great continuity and credibility in the communities we serve. Almost without fail, the managers of the companies are actively involved in a full range of community activities. As an example, I personally have been president of the Cuyahoga Valley Association, an organization which has worked closely with the National Park Service in promoting the Cuyahoga Valley Recreation Area.

As an organization, CPDA is involved in a number of civic activities. In 1987, we sponsored a reading promotion program in conjunction with Family Circle magazine, honoring and presenting cash grants to 24 community groups involved in the struggle against illiteracy. In addition, we annually sponsor a scholarship program for children in our industry.

I should note here that our members do not knowingly handle or distribute any publications which are legally obscene. However, as you are aware, the definition of obscenity, as stated by the Supreme Court, is open to wide interpretation, and by its very definition may vary from community to community. Being involved in the management of several different companies in several different communities, I can assure you that we distribute to retailers a very different profile of magazines in each of those communities. The same is undoubtedly true for all of CPDA's 400 member companies.

Practically speaking, our agencies cannot regularly screen the editorial content of the thousands of different books and magazines which we receive each month, including numerous publications that arrive at our warehouses unordered or unsolicited. Although all wholesalers receive in their warehouses substantially the same publications, we do not, in every location, distribute to our retailers everything we receive. In spite of handling thousands of magazine titles, each of them a new product each month, individual distribution decisions are made all of the time which reflect our concern for our own communities.

With these realities in mind, the legislation under consideration poses a number of serious problems for the industry. If the bill is enacted in its present form, fear of prosecution is likely to cause wholesalers and retailers to err on the side of caution by dropping whole categories of publications, including much that is constitutionally protected.

For example, the bill would make it a crime to "knowingly receive or possess with intent to distribute any obscene book, magazine ... or any other matter." We do not knowingly distribute any publication that is legally obscene. Yet, as I have described, our member wholesalers regularly receive in their warehouses thousands of publications, some of which we decide not to distribute because of sensitivity to our communities. Despite the community responsibility that we try to exercise, under the proposed law we could be prosecuted just for receiving and holding material later determined to be obscene.

As I have tried to demonstrate, the mass market distribution system for magazines and books is designed to make information available to the public as widely and as quickly as possible. The publisher decides, in advance of publication, what is shipped to the wholesaler; and the wholesaler decides, in advance of receipt, what will in turn be shipped to the retailer. Neither we the wholesalers, nor the retailers order what we receive. While we "know" in advance the titles of the magazines and books which we will receive, we do not "know" the content of them. Therefore, we may receive and distribute to our customers, the retailers, without our knowledge, magazines and books which could, because of varying community standards, later be found to be obscene.

Certainly this puts companies like my own in great jeopardy. However, consider the case of the supermarket, which receives its regular supply of Cosmopolitan, Elle, or Glamour, only to find that the new issue, judged by local community standards, is obscene, because of the content of some editorial or advertising. The proposed legislation, as written, could result in the possible forfeiture of the entire store. I certainly doubt that this is the intent of the legislation; however, from a laymen's point of view, such as a wholesaler and a retailer, that is the net effect.

In addition, the legislation contains extremely severe penalties, including very sweeping forfeiture provisions. As a result, a wholesaler or retailer convicted of handling obscene material could be made to forfeit not only the obscene material itself but also any mainstream inventory that is purchased with the proceeds of the sale of the obscene material or any item that is the "instrumentality" of obscenity, like a delivery truck.

Under the above circumstances, and in light of the forced distribution system, and the difficulties of determining what is and is not obscene; both wholesalers and retailers are likely to make broad decisions not to handle whole categories of publications.

Indeed, it is not unlikely that they would decide not to not to handle any publications which could contain sexaully related materials, for fear they might later be judged to be obscene.

In recent years, a wide range of mass market magazines and books has been the target of pressure groups attempting to limit their availability. Distribution and sale of magazines such as New Woman, Cosmopolitan, Glamour, Elle, Texas Monthly, and even Sports Illustrated, besides men's magazines, have been restricted because of one group or another's protest about editorial content.

If the enforcement provisions of the proposed legislation were enacted in any of these situations, the result would be the complete disruption of the sale and distribution of all mass market magazines sold by the affected wholesaler.

This legislation would greatly increase federal involvement in an area that, until now, has more appropriately been left in the hands of state and local authorities. We try to ensure that our retail customers follow local ordinances concerning the sale and display of materials containing adult editorial content. We believe we have a responsiblity to do that. We are convinced that the appropriate jurisdiction for these matters remains at the local level. We are concerned that by federalizing this process, our ability to exercise discretion -- while ensuring that constitutionally protected material remains available to adults -- may be jeopardized.

Public opinion surveys, including a recent one that I am submitting with this statement, make clear that most adult Americans oppose censorship and instead want the right to read a wide range of books and magazines. It is our firm conviction that in its effort to protect Americans from obscenity, this legislation would have the wholly unintended actual effect of significantly limiting the diversity and availability of reading materials throughout our nation.

As I stated earlier, we support those parts of the bill dealing with child pornography. However, we urge you to eliminate those portions dealing with obscenity, since enactment would seriously limit the First Amendment rights of all Americans.

Thank you.

Attachment to Testimony of George R. Klein

Penn + Schoen
Associates, Inc.

245 East 92nd Street, New York, NY 10128 • (212) 534-4000

Mark Penn
Douglas Schoen

To: Americans For Constitutional Freedom
From: Douglas Schoen, Penn & Schoen Associates Inc.
Re: Our Recent Survey
Date: March 7, 1988

This memorandum is designed to summarize the results of our recent survey of 800 randomly selected Americans on attitudes toward attempts by the government and interest groups to limit free access to books and magazines. Interviewing for the survey was conducted February 15th and 16th from our central telephone facility in New York.

The survey showed that about four-fifths of the American people were against restricting access to lawful periodicals. Roughly two-thirds said that the government should not discourage stores from selling particular books and magazines, and about four in five said they should not be in the business of encouraging the sale of particular books and magazines. There was also a clear sense that protecting the right to purchase books and magazines people want to read was more important than removing publications some find objectionable from the shelves of stores.

Initially, we found that the issue is of much lower salience than it was two years ago. Now, only 35% said they have heard something about the issue, while 64% indicate that they have heard nothing about it. In keeping with these findings, only 23% said they felt this was an important issue for Congress to address, while 73% said there were other more important issues for them to take up.

Despite the lesser importance accorded the issue, the American people still believe that, in the abstract, we should have the absolute right to purchase all magazines that are not illegal. Overall four-fifths took this position, while 14% disagreed. These numbers are close to what we found two years ago when we asked this question.

**TABLE 1 AMERICANS HAVE RIGHT TO PURCHASE ALL LEGAL MAGAZINES OR NOT?**

| HAVE RIGHT | | NOT HAVE RIGHT | | DON'T KNOW | |
|---|---|---|---|---|---|
| 86 | 88 | 86 | 88 | 86 | 88 |
| 84% | 80% | 13% | 14% | 3% | 7% |

Once again, there was across the board support for this position. Among born-again Christians, 72% said it was important for the American people to have this right.

While few felt this issue was important to take up, a solid majority (61%) did indicate that this issue of free access to periodicals was very important.

We also asked whether the government should discourage stores from selling particular books and magazines and found that the responses were almost identical to those that we achieved two years earlier.

**TABLE 2 SHOULD THE GOVERNMENT DISCOURAGE STORES FROM SELLING PARTICULAR BOOKS AND MAGAZINES?**

| SHOULD DISCOURAGE | | SHOULD NOT DISCOURAGE | | DON'T KNOW | |
|---|---|---|---|---|---|
| 86 | 88 | 86 | 88 | 86 | 88 |
| 25% | 29% | 67% | 67% | 8% | 4% |

Further, we found that respondents continue to believe that the government should not try to encourage stores to sell particular magazines and books. Again, the responses we got in our most recent survey were very close to those that we obtained two years earlier.

TABLE 3 SHOULD THE GOVERNMENT ENCOURAGE STORES TO SELL PARTICULAR BOOKS AND MAGAZINES?

| SHOULD ENCOURAGE | | SHOULDN'T ENCOURAGE | | DON'T KNOW | |
|---|---|---|---|---|---|
| 86 | 88 | 86 | 88 | 86 | 88 |
| 12% | 17% | 83% | 79% | 5% | 5% |

Forty-eight percent said they favored efforts by citizen action groups to pressure newsstands to remove particular magazines they find offensive, while 49% said they oppose such efforts. Two years earlier, 52% indicated that they oppose such efforts and only 40% favored them.

There was even less support for picketing by these groups to get stores to remove magazines they find offensive. As Table 4 shows, a solid majority in both surveys opposed the concept.

TABLE 4 FAVOR OR OPPOSE PICKETING BY CITIZEN GROUPS TO PRESSURE STORES TO REMOVE MAGAZINES?

| STR. FAVOR | | MOD. FAVOR | | MOD. OPPOSE | | STR. OPPOSE | | DON'T KNOW | |
|---|---|---|---|---|---|---|---|---|---|
| 86 | 88 | 86 | 88 | 86 | 88 | 86 | 88 | 86 | 88 |
| 14% | 21% | 21% | 21% | 24% | 20% | 34% | 31% | 8% | 8% |

Sixty-one percent said that this type of activity was a form of censorship, while only 30% said it was not censorship. This is, again, a similar level of response to what we got two years ago when 56% said it was a form of censorship and 35% disagreed.

We also repeated a series of agree-disagree statements about access to periodicals. As Table 5 shows, the responses in both years were close to identical.

TABLE 5 AGREE OR DISAGREE WITH SELECTED STATEMENTS?

| | STR. AGREE | | SOMEWHAT AGREE | | SOMEWHAT DISAGREE | | STR. DISAGREE | | DK | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 86 | 88 | 86 | 88 | 86 | 88 | 86 | 88 | 86 | 88 |
| FREEDOM UNDER ATTACK IF GOV'T RESTRICTS MAGAZINES | 54% | 50% | 21% | 21% | 16% | 13% | 9% | 9% | 4% | 3% |
| UP TO INDIVIDUAL TO DECIDE READING NOT GOV'T | 79% | 79% | 13% | 13% | 4% | 3% | 3% | 2% | 2% | 1% |
| GOV'T SHOULD NOT TELL PEOPLE WHAT TO READ | 77% | 78% | 11% | 13% | 4% | 6% | 5% | 3% | 2% | 1% |

We also asked which was more important: to protect the American people's right to purchase the magazines and books they want, or to make sure magazines and books some groups object to are kept off the shelves? We found that 75% said it was more important to protect the right to purchase books and magazines(as opposed to 73% two years earlier), while only 19% said it was more important to keep magazines and books some groups object to off the shelves(as opposed to 22% two years earlier).

Fifty-six percent also agreed with the assertion that if you restrict the availability of one type of magazine it will lead to restrictions on other types of magazines, while 39% disagreed with this view.

Further, 60% said it was unhealthy for organized groups to try to tell people what to read and 79% was it was unhealthy for government to restrict these types of activities. In 1986, the comparable responses were 56% for organized groups and 80% for government.

Also, 70% said American society can deal with the issue of objectionable magazines and books by regulating where they are placed on the shelves and who can purchase them, while 21% said that other measures like banning the sale of these periodicals need to be enacted.

Finally, the impact of the Moral Majority was seen as somewhat negative. Only 23% said they were more likely to favor efforts to stop convenience stores from selling periodicals because of the Moral Majority's involvement while

34% said they would be less likely to support such efforts if the Moral Majority was involved. Thirty-four percent said these efforts would have no effect on their attitude. Seventy-four percent said that if the Moral Majority succeeds in getting stores to remove magazines like Penthouse and Playboy they will move on to other periodicals, while 17% said they would stop with those two publications.

The last question we asked probably sums up the rest of the data quite clearly. We asked who the sample felt should make the decisions about the type of materials that should be available to the public--the government, local prosecutors, bookstore owners, or the public. Almost three-quarters of our sample opted for the public.

**TABLE 6 WHO SHOULD MAKE DECISION ON MATERIALS THAT ARE AVAILABLE TO THE PUBLIC?**

| GOVERNMENT | PROSECUTORS | NEWSSTAND OWNERS | PUBLIC | DON'T KNOW |
|---|---|---|---|---|
| 8% | 7% | 9% | 71% | 4% |

Thus, there has been virtually no change in public opinion in the past two years. The American people are committed to free access to lawful periodicals and books. Further, they are resolute in believing that this is a subject that the government should stay out of.

CPDA COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS
60 East 42nd Street, Suite 2134, New York, NY 10165 • 212-818-0234

President: JOHN M. HARRINGTON

June 21, 1988

Hon. Dennis DeConcini
Chairman
Patents, Copyright, and Trademarks
Subcommittee
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Senator DeConcini:

Thank you very much for the opportunity to add comments on behalf of CPDA and myself to the record regarding the recent hearings on "The Child Protection and Obscenity Enforcement Act" and the "Pornography Victims Protection Act." I am responding in particular to your letter of June 14, 1988.

I would like to note, that as of this date, I have not yet received a copy of the transcript and therefore, have not had the chance to review it to make any possible corrections. However, since the deadline for responding was tomorrow, June 22, I felt I should go ahead and respond to the other questions in your letter.

As I tried to indicate in my letter of June 10 (copy enclosed), even if mass market magazine distributors, like CPDA members, were to identify the approximately 5% of the 2,500 magazine titles they regularly stock and distribute as those most likely to contain possibly obscene material, it would be a futile task to try and insure that we never are in violation of some of the provisions of S. 2033, and therefore in jeopardy of the forfeiture provisions of that bill. As I noted, since the current Supreme Court definition of obscenity requires that material be "taken as a whole," and that it be viewed in terms of "local community standards," the subjective nature of these standards would prove insurrmountable to even the largest distributors. Since the final determination of obscenity can only be made in a court of law, the actual effect would be that many distributors just might refuse to handle a wide range of material, any of which could conceivably be charged in certain localities.

In response to the specific questions posed by Senators Grassley and Simon, I offer the following comments: both Senators ask about the impact of the record keeping requirements of bills S. 2033 and S. 2021 on mass market magazine distributors. As CPDA understands

(continued)

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Periodical Marketers of Canada
Cliff O. Connelly, Tech News Agency, Ltd., 5 Kirkland Street, Kirkland Lake, Ontario, Canada P2N 3J6

CPDA is the international association of local independent wholesale distributors of magazines, paperback books, and newspapers in the United States and Canada

the provisions of these bills, it is our opinion that there is no direct requirement upon mass market magazine distributors and we do not feel that it is appropriate for us to comment on behalf of publishers. It would seem to be more appropriate to direct those questions directly to mass market publishers, as well as publishers of so-called adult material.

However, Senator Simon specifically asked, "What types of materials handled by members of CPDA would be affected by this requirement?" Again, while our attorneys advise us that the record keeping requirements of this portion of both bills do not directly effect mass market magazine distributors, we can remark, that using broad definitions, a fairly substantial number of publications, many of which not normally be considered as "adult," would be effected. Although there appear to be no burdensome requirements made upon distributors by this legislation, a very broad range of titles that we handle could be effected.

While members of CPDA are very sympathetic to the intentions of the drafters of this legislation, we are firmly of the opinion that, in certain areas, the legislation will undoubtedly have a chilling effect on the distribution of mass market magazine titles far beyond the intent. Even if the forfeiture provisions were never used against either mass market bookstore managers or other retail outlets, or mass market magazine distributors, many of them for fear of potential prosecution would severely limit the range of both magazines and books they carry and make available to the reading public.

The experience of the Attorney General's Commission on Pornography demonstrates the emormous potential for chilling effect in this area. The Executive Director of the Commission, Mr. Alan Sears, who also testified before the Senate on behalf of Citizens for Decency Through Law, sent a letter to many mass market retailers informing them they had been identified as sellers of pornography and would be so identified in the final report of the Commission if they did not respond within a certain time frame. Rather than respond, approximately 15,000 drugstores and convenience stores ceased handling magazines such as Playboy and Penthouse rather than be identified in the final report of the Commission as sellers of pornography. Even when a court action forced the Attorney General's Commission to retract the letter and refrain from including in its final report any list of retailers, most of the effected stores did not reinstate the publications. On many occasions, Attorney General Meese and Commission Chairman Henry Hudson claimed that the Commission had no intention of restricting the sale and distribution legally protected publications, such as Playboy and Penthouse; however, the real effect of the Commission Report was to seriously restrict the sale and distribution of those and other titles.

In summary, I would like to emphasize ever so strongly that CPDA and its members have no problems with the first part of S. 2033, which deals with child pornography. In fact, we support that part of the bill and have stated so on many occasions. However, as presently written, those portions of the bill providing forfeiture for violations of the obscenity laws could have a severe chilling effect on distribution of all mass market magazines in the United States. Therefore, we ask you to consider possible revisions that would make the effect of those portions of the bill to be more clearly directed to those businesses which are trafficking solely in those types of materials.

Once again, CPDA and its members thank you for the opportunity to testify and provide information to the Judiciary Committee. We appreciate the difficulties you are facing and we would like to insure you we are prepared to cooperate in any way we can to see that the final work of the Committee is an effective and fair bill which will accomplish its goals.

Sincerely yours,

George R. Klein
Past Chairman, CPDA
President
Geo. R. Klein News Company
1771 East 30 St.
Cleveland, OH 44114

GRK:bvm
Enclosure

GEO. R. KLEIN NEWS COMPANY • 1771 EAST 30th STREET, CLEVELAND, OHIO 44114 • 216-623-0370
Distributors of Newspapers, Magazines and Paperback Books

June 10, 1988

Hon. Dennis DeConcini
Chairman
Patents, Copyright, and Trademarks
Subcommittee
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator DeConcini:

I would like to thank you for the opportunity to testify before the Judiciary Committee, on June 8, regarding S. 2033, "The Child Protection and Obscenity Enforcement Act." I and the other magazine distributors who are the 400 members of the Council for Periodical Distributors Associations appreciate the courtesy you showed us and your willingness to consider our reservations about the legislation.

Also, at this time, I would like to expand upon several points from my testimony. Although it is an impracticality for distributors to set up systems to review the editorial and advertising content of the 2500 plus titles that are received regularly, it would be equally futile to identify the 5% of those titles most likely to contain possible obscene materials. First, please recall that the current Supreme Court definition of obscenity requires that the material be "taken as a whole," and that it be viewed in terms of "local community standards." Both of these terms are enormously subjective and would still draw upon intellectual and manpower resources which would be extremely taxing upon even the largest distributors. This does not even begin to take into account the 5000 new books received annually. In addition, I must emphasize again that the potential for charges of obscenity, given the subjective nature of the definition, could conceivably be leveled against a range of publications much larger than what might be labeled men's or adult magazines.

In addition, while the above description could be burdensome for any distributor, it would be even more so for a retailer. Supermarkets, drugstores, convenience stores, or discount stores, where all magazine sales represent generally less than one percent of their total business, would be inclined to eliminate the entire department rather than even raise the spector of risks involved under the forfeiture provisions of the proposed law.

We appreciate the difficulties you are facing as you attempt to draft legislation which will be effective in dealing with child pornography, whike still providing First Amendment protections for Constitutionally insured publications. However, we think that as currently drafted, the proposed legislation could expose mass market magazine and book distributors to crippling forfeiture liabilities; and that the law, if enacted, would almost certainly have a chilling effect on our businesses. While none of our members have ever been found guilty of distributing obscene materials, several have been prosecuted. Under the extreme penalties provided in this legislation, many of them might prefer not to expose themselves to the increased potential for risk.

Once again, on behalf of all CPDA's members, I am extremely appreciative of the time and courtesy you extended us in allowing us to testify. If there is any information we can provide you, please feel free to call at anytime.

Sincerely yours,

George R. Klein

GRK:gkd

Senator DECONCINI. Thank you.
Mr. Morrow.

## STATEMENT OF EDWARD MORROW, JR., VERMONT BOOKSELLER, AND PRESIDENT-ELECT, AMERICAN BOOKSELLERS ASSOCIATION

Mr. MORROW. Thank you, Mr. Chairman.

I am Edward Morrow, Jr., the elected president of the American Booksellers Association. I thank you for this opportunity to testify. I apologize that we do not have written testimony at this time. We just returned from the ABA Convention and Trade Show in California where over 25,000 publishers, booksellers, authors and agents were gathered. It was in California that we learned of this bill. We will shortly be submitting a formal statement. We ask that it be included in the record.

Senator DECONCINI. It will be included.

Mr. MORROW. As president of the 6,783-member American Booksellers Association, I am a bookseller. My wife and I live in Manchester, VT, where we run a bookstore, a family store. Our community considers it a major resource. Schools from surrounding towns, therapists, church study groups, libraries, parents, and the public at large, have commented on what an important community resource we are. We pay close attention to the appropriateness of what we sell, especially to children. We often ask children to bring their parents back if they want to purchase something that we consider not appropriate for them at their age.

We sell magazines as well as books, and by choice our particular store does not stock the men's magazines known for their sexual material. Many of my respected colleagues do, and that is their right. But we are not prudes. We sell 30,000 titles, a cross-section of typical interests of a well-educated American community, and that includes works with sexual material.

As ABA President, I represent stores like mine in rural and resort communities, urban stores, specialty stores that specialize in children's books and travel books, cookbooks, mall stores, chain stores, both national chains and regional chains, and any book retailer that considers the services of the American Booksellers Association of value. We do not, to our knowledge, have any so-called adult bookstores as members.

As I understand S. 2033, it has two parts: Title I, child protection; title II, obscenity enforcement. We emphasize that we have absolutely no reservations regarding the sections dealing with child pornography. Our concern is solely with the obscenity enforcement sections.

Our members—and I, as a bookseller—sell art, photography, marital and sex education books, books on health matters, novels, all having sexual content but not obscene. This bill will impinge on our freedom to sell these books and our customer's right to have them available to be bought.

Fear is what will do this, our fear. Our fear will encroach upon the free expression of ideas in this country if the bill is passed as presently written. It is the dire consequence for innocent mistakes made by decent contributing members of communities throughout the United States, booksellers, that will cause this fear. This consequence is out of balance with the crime that may be innocently committed.

For instance, I could go to jail for up to 2 years for the crime of being in receipt of an obscene work. Many new titles are published every year, and we buy them sight unseen. It is impossible for us to review all of these titles; and even if we could review them, we are not expert enough to be able to judge what might later be declared obscene.

There are 700,000 plus titles in print and 40,000 new titles published every year. There is just no way we can deal with reviewing what is being processed through our store. Indeed, under this statute, any bookseller could very easily be set up by an over-zealous community group that does not like some of the works being sold by a legitimate bookstore, constitutionally protected works, but objectionable, nevertheless, to a community group. They could come in and special order books. Because there are so many books in print, no store can carry even a fraction of what is available out there. So most good bookstores provide special order services. We special order hundreds of books weekly through our store. Our clerks order things, they come in and are processed through the back, brought out front and sold. We could very easily process through books that sound innocent that we were not aware were obscene. This statute would allow us to be set up that way.

If we innocently offered two or more books for sale, I am subject to 5 years imprisonment. By some fluke or circumstance, booksellers convicted of either crime, receipt or selling, are subject to forfeiture of their entire business, their livelihood, a decent livelihood but for this fluke.

In closing, I would just like to say that this proposed law is deemed by us as unfair to booksellers involved in legitimate business, but it will have consequences far beyond any one bookstore. Booksellers will be forced to stop dealing in any material with sexual content—novels, art, photography, health, sex education books—that community members might seize upon to attack as obscene. I believe we are discussing a particularly insidious erosion of the first amendment.

Thank you for this opportunity to testify.

[Response to questions follow:]

## SEN. PAUL SIMON

## QUESTION FOR ED MORROW, PRESIDENT-ELECT AMERICAN BOOKSELLERS ASSOCIATION

In your appearance before the Committee, you focused your testimony on the Obscenity Enforcement provisions of S. 2033. I would like to draw your attention to the Child Pornography title of the bill.

S. 2033 would amend Chapter 110 of title 18, United States Code, to require that records be kept for anyone producing a book, magazine, periodical, film, videotape or other material which contains one or more visual depictions of actual sexually explicit conduct. This requirement extends to any picture taken up to 25 years before the sale or distribution of the product. If these records are not kept, the performer is presumed to be a minor in violation of Section 2251(a) of Title 18.

As you know, not all depictions of actual sexual conduct are those which appear in obscene or even pornographic materials.

> What types of materials handled by members of the American Booksellers Association would be affected by this requirement?
>
> What steps would your members have to take to ensure compliance with the 25-year retroactivity of this provision?
>
> What other effects could the records-keeping requirement have on your industry?

# HEARING QUESTIONS
BY SENATOR CHARLES E. GRASSLEY
JUNE 8, 1988
PANEL III

I'D LIKE YOU TO COMMENT ON SECTION 103 OF BOTH S. 2033 AND S. 2021, REGARDING RECORD KEEPING REQUIREMENTS. AS YOU KNOW, S. 2033 WOULD REQUIRE RECORDS OF THOSE WHO PRODUCE SEXUALLY EXPLICIT MATERIAL GOING BACK 25 YEARS, WHILE THE REQUIREMENT IN S. 2021 TAKES EFFECT, GENERALLY, 180 DAYS AFTER ENACTMENT OF THE BILL. WOULD YOU DISCUSS THE MERITS OF RECORD KEEPING IN GENERAL ?

CAN YOU EXPAND UPON THE CONSTITUTIONAL ARGUMENTS AGAINST THE RECORD KEEPING REQUIREMENT IN S. 2033 AND EXPLAIN WHY YOU BELIEVE THAT THIS SECTION WILL NOT WITHSTAND CONSTITUTIONAL SCRUTINY ?

WOULD YOU COMMENT ON THE PROSPECTIVE APPLICATION OF THE RECORD KEEPING REQUIREMENT CONTAINED IN S. 2021 ?

June 22, 1988

RESPONSE TO SUPPLEMENTAL QUESTIONS REGARDING TESTIMONY

ON THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT

BY EDWARD MORROW, JR. BEFORE THE SENATE JUDICIARY COMMITTEE.

Addressing the question of what types of materials handled by members of the American Booksellers Association would be affected by the requirements for record keeping imposed by the amendment to Chapter 110 of title 18, United States Code, I must express some confusion about interpretation of the exact meaning of "visual depictions". Does this include drawings of an actual person or persons? If it does, then a vast amount of material--books, post cards, note cards, magazines, prints and posters--would be affected by this bill.

Even if drawings are not included in the definition of "visual depiction" by virtue of the bill's exclusion of "simulated conduct", there are many works with photographs which could fit somewhere in the wide spectrum of what might be considered "lascivious". Some of these are photographic studies of the nude, others are legitimate sexual therapy manuals, all titles published by mainstream publishers.

Considering that "actual sexually explicit conduct" is defined to include "lascivious exhibition of the genitals or pubic area of any person" (subparagraph (E) of paragraph (2) of section 2256 of title 18), one can conclude that ANY depiction involving the pubic area is open to attack under this bill. Indeed, I have heard it argued in my own community that any depiction of the pubic area fits the dictionary definition of lascivious ("tending to excite lustful desires"), and for some people that may be true. But that interpretation doesn't conform with the commonly accepted community standards with which I am familiar. In fact I would venture to say that the majority of photographs involving frontal nudity that are found in books we stock are NOT what the average person would find "lascivious". But some people could probably be found who would consider all of them objectionable, and therefore subject to the provisions of this bill.

As to what steps our members would have to take to ensure compliance with the 25-year retroactivity of the record keeping requirements, my reading of the bill is that "Whoever produces any book, magazine,...." [Sec. 103.Paragraph 2257 (a)] refers to manufacturers or publishers and not to retailers. So I do not see that the retailer is required to take any steps to comply with the record keeping or the retroactivity provisions of the bill.

Now if "produce" is construed to mean "to bring into view" or "to offer for inspection", the retailer would then, indeed, be required to keep the referenced records. And this would be an absolute impossibility for booksellers to comply with. Such a provision would jeopardize any bookseller carrying any book with a photograph showing frontal nudity. Booksellers would be forced, for self-preservation, to remove all such vulnerable works. But since the bill does explicitly state that "the term 'produces' means to produce, manufacture, or publish and includes duplication, reproduction, or reissuing of any material;" I believe the intent is not to include retailer in this provision. Thus , if I am reading the bill correctly, our members, booksellers, are not required to take any steps to ensure compliance with the 25-year retroactivity provisions of the bill. However, I would request that the Committee make clear that this is the intent so that booksellers are not surprised by an unintended interpretation at some point in the future.

However, since publishers would be subject to those provisions I would envision their recalling from retailers and wholesalers all unsold copies of numerous books of art and fashion photography, and sexual therapy books in order to attempt to comply with the recording keeping requirement of affixing "a statement describing where the records required...may be located" [Sec 103. Paragraph 2257,subsection (e)(1)]. The 25-year retroactivity provision may well be impossible for many publishers to comply with and in such cases the publisher will be faced with destroying the vulnerable works or risk the penalties of this bill and the costs of defense in the hope that the vulnerable works will, in the end, be fully protected by the First Amendment. It seems clear that a large number of non-obscene works involving frontal nudity would become so vulnerable under this bill as to cause their complete disappearance from bookstore shelves.

I would like to reiterate that the American Booksellers Association is not in any way opposed to child protection. Our members are decent, constructive, contributing members of their communities. My testimony is given in the spirit of aiding in the process of constructing fair and just law. In that spirit I urge you to construct this law to achieve its desired ends while not infringing upon the First Amendment rights of all Americans.

Respectfully submitted,

Edward A. Morrow, Jr.

Senator DeConcini. Ms. Florence.

## STATEMENT OF HEATHER GRANT FLORENCE ON BEHALF OF MEDIA COALITION, INC., NEW YORK, NY

Ms. Florence. My name is Heather Florence. I did submit testimony on behalf of the Media Coalition, and I also submitted a one-page summary of that testimony. I would request that they be included in the record.

Senator DeConcini. It will be included in the record.

Ms. Florence. I do want to emphasize that I am not here to oppose any aspect of Title I, the child pornography provisions, but only the obscenity enforcement provisions.

I would like to take just a few moments to tell you who I am and why I am here. First of all, contrary to the agenda statement, I am not a past general counsel of the Media Coalition, although I am here representing them today. I am the former general counsel of a major book publisher, Bantam, Doubleday, Dell. I chose about 9 months ago or a year ago to retire from that hectic, frenetic life and move with my family to a farm in a small rural section of Connecticut. I allowed myself to be dragged out of retirement when I became aware of the legislation before you today because I found it so very troubling.

The members of the Media Coalition include several trade associations. My former company, Bantam, Doubleday, Bell, is a member of the Association of American Publishers, the principal trade and educational publishers of the country. Members of the book and magazine distribution network, such as CPDA and ABA are also members of the Media Coalition.

None of the companies represented by the trade associations are pornographers; none of them are racketeers. Yet this legislation does give them all pause. If they are to sell anything found to be obscene, they are suddenly treated as if they are handling drugs or other contraband. Any number of first amendment-protected materials that are in their inventories and part of their business can be seized, and that would violate their first amendment rights and those of their customers.

Rather than explain my views of why this legislation is so harmful, I would like to respond or comment on the questions that you, Mr. DeConcini, put to some of the prior panelists this morning, because I do think they highlight the most difficult aspects of this legislation for us.

First of all, you asked about whether this would create a national standard, and you were told by Mr. Showers that it would not. I differ with that. As a practical matter, if there were to be a prosecution in any Federal district, the jury in that district could find material to be obscene which would have the de facto effect of precluding its continued distribution to other parts of the country. The prior speaker, Mr. Ward, indicated that there would, indeed, be forum-shopping to find those jurisdictions where that would most likely happen.

To give the example of a book publisher like my company, we pretty much publish everything for national distribution; everything leaves one central warehouse location; and if there were to be an obscenity ruling against a title in any one jurisdiction, we could find that book held up throughout the country because it could be seized from the warehouse. Further, due to the forfeiture provisions, other aspects of the business and inventory in that warehouse could be seized as well.

Then the chilling effect question. It seems to me clear that this law will have a chilling effect if it is passed. Mr. Ward and Mr. Showers indicated that there is no problem with that, there have always been obscenity laws on the books, and that booksellers and wholesalers have had to make judgments and deal with those perils or risks or aspects of their businesses. But, previously, they were not subject to either 2 years in jail or 5 years in jail or the loss of their entire businesses. The severity of these penalties and the sweepingness of the prior restraint make this a whole new ball game.

Finally, the supermarket question you asked I think is a very real one. The supermarket does not know what comes in and what goes out necessarily. They order things or things are imposed on them by their distributors. If the local law enforcement people think that they are not exercising proper discretion and want to go into that supermarket and talk about removing a title from sale, just imagine how much more leverage they would have under this bill. They can go in and effectively dictate what can be on the racks. Because if the supermarket manager does not withdraw it under this legislation, not only are the criminal penalties severe, but perhaps he could lose his Haagen-Dazs ice cream, certainly his trucks and his lights.

So I do not think we should have to rely on the discretion of prosecutors. Indeed, Mr. Ward has said that, and I quote him, I believe accurately, if this bill is passed, it will "immediately be pressed into action by U.S. attorneys." That, I submit, is a very frightening prospect.

Just in closing, I want to make some final sort of legal observations. I am, or at least was, a New York lawyer; and although I have put that aside mostly for sheep farming and child rearing, there are a couple of things from law school and from my years of practice that sunk in deep and stayed. One is, of course, the absolute prohibition against prior restraints. This clearly is one.

Secondly, we all know, and the Supreme Court has said over and over again, what is needed in separating unprotected speech from protected speech are fine tools. This legislation, I submit, is not a scalpel; it is more an atom bomb and it should be put aside.

Thank you very much.

[The prepared statement of Ms. Florence follows:]

# SUMMARY OF
# TESTIMONY OF HEATHER GRANT FLORENCE
# FOR THE MEDIA COALITION, INC.
# BEFORE THE COMMITTEE ON THE JUDICIARY
# UNITED STATES SENATE
# JUNE 8, 1988

The Media Coalition, Inc., is a group of trade associations representing those in the businesses of book publishing and book and periodical distributing and retailing. The Coalition is testifying only in opposition to Title II of S. 2033. It is voicing no objection to Title I, which deals exclusively with child pornography.

Title II of S. 2033 would, if enacted, have a devastating impact on the availability of a whole range of non-obscene reading materials to the general public. The sweeping forfeiture provisions of this Bill would place the survival of the businesses represented by members of the Media Coalition at risk.

The businesses that are represented by these trade associations range from large corporations to small mom-and-pop stores. They are not "engaged in the business of selling or transferring obscene matter", but they are threatened by this legislation: (1) The forfeiture provisions can destroy a whole business enterprise. (2) The criminal penalities are unconscionably severe for minimal illegal activity.
(3) Federal intrusion into an area where fifteen years ago the Supreme Court told local communities to adopt their own standards, within certain constitutional guidelines, will create havoc.

These businesses will become frightened of handling any material which might put them at risk. That "risky" material can include just about every kind of publication because there is no litmus test for distinguishing obscenity from speech protected by the First Amendment.

The supporters of this Bill proclaim its effectiveness because similar procedures have proven successful in the fight against drugs. But, drugs are immediately identifiable and presumptively illegal. Books and periodicals can only be declared illegal after lengthy court proceedings. Until then, they are presumptively constitutionally-protected.

# TESTIMONY OF HEATHER GRANT FLORENCE
# FOR THE MEDIA COALITION, INC.
# BEFORE THE COMMITTEE ON THE JUDICIARY
# UNITED STATES SENATE
# JUNE 8, 1988

My name is Heather Grant Florence. I am here today on behalf of the Media Coalition to address some legal and business concerns about Title II of S. 2033. I am not here to oppose any of the provisions of Title I, which deal with child pornography.

I am a member of the New York Bar and have worked in the intellectual property field for almost 20 years, the last 10 (until 9 months ago) as General Counsel of a major book publisher, now Bantam Doubleday Dell. In September of last year, I chose to semi-retire and move with my family (husband and 9-year old son) to a small farm in a rural corner of Connecticut. While I still do brave New York City on my consulting trips to Bantam Doubleday Dell, this is the first time I've agreed to leave my sheep and garden and miss a Little League game for an industry-wide issue. I have come here because this Bill is frightening.

Title II of S. 2033 would, if enacted, have a devastating impact on the availability of a whole range of non-obscene reading materials to the general public in small towns and big cities throughout this country. In particular, the sweeping forfeiture provisions of this Bill would place the survival of almost all of the businesses represented by members of the Media Coalition at risk. These businesses publish and distribute books and periodicals, through a variety of middlemen, to bookstores, newsstands, department stores, chain-stores, supermarkets, libraries, schools and universities throughout the nation.

The Media Coalition is comprised of the following trade associations. The Association of American Publishers is the trade association representing most publishers of trade books (fiction and non-fiction for adults and children), textbooks and educational materials, from pre-school through graduate school. The American Booksellers Association's 4,000 members own some 6,000 retail outlets where books are sold. The Council for Periodical Distributors Associations is the national trade association for almost 400 wholesale distributors of magazines, comic books, paperback books (increasingly hardcover books) and newspapers in every state of Union. The members the International Periodical Distributors Association distribute or arrange for the distribution of this myriad of materials to the wholesalers for their ultimate distribution to over 170,000 different retail outlets.

The businesses that are represented by these trade associations range in size from multi-billion dollar, publicly-traded corporations to small mom-and-pop shops. They do have two things in common: (1) They are not "engaged in the business of selling or transferring obscene matter" and (2) they are threatened by this legislation. The major aspects of the Bill which create this problem are:

1. The forfeiture provisions can destroy a whole business enterprise.

2. The criminal penalties are unconscionably severe for minimal illegal activity.

3. Federal intrusion into an area where fifteen years ago the Supreme Court told local communities to adopt their own standards, within certain constitutional guidelines, will create havoc.

A large number of the publications that pass through this distribution network have some sexual content. In some cases the content is obvious; in many it is not. There may be a sexy lady on the cover of a sailing magazine that should give the dealer no pause, where locked away in a tabloid there could be material meeting the community's definition of obscenity. It is obvious that a distributor or retailer cannot be familiar with the contents of the thousands of publications coming through on a daily basis from diverse and multiple sources. Often they hardly see the contents of the thousands of publications that they handle.

And when they are aware of the contents of the publication, they must try to make sound decisions about whether anyone will charge that that material is obscene. In the years since the Miller decision, many of the retailers and wholesalers have come to rely on the local standards, which in some states are expansive; eight states have no ban on the sale of obscene material to adults.

Should this Bill pass, individuals and companies in the communications business would not only continue to be subject to state and local laws, but would face the threat of federal penalties as well. The risks of doing business are suddenly magnified to the extreme. If a shop keeper under this Bill should be found to have received or have possession of a single item declared obscene, he is subject to the forfeiture provisions. He will lose an indeterminate amount of lawful inventory and may well find his whole shop seized. He can also be sentenced to two years in prison. If he sold two copies, make that five years.

With this federal noose hanging over them, it is inevitable that these businesses will become frightened of handling any material which might put them at risk. That "risky" material can include just about every kind of publication. In recent times novels on the bestseller list, magazines that have tens of millions of readers and works of lasting literature that are taught in our schools, as well as treatises on physical and mental health and sex education have all been challenged.

Because there is no litmus test for distinguishing obscenity from speech protected by the First Amendment, every official and private citizen can consider himself or herself an expert on deciding what is obscene. Even the Federal Government, through the staff of the Meese Commission, has recently played this role of unofficial censor. The Commission sent a letter to many companies calling on them to justify their activities, lest they be listed as "pornographers" in the Commission's Report. In response to this threat, some prominent retailers removed mainstream publications from sale. It required litigation to have the Commission retract the letter, but the fear does not dissipate quickly. It is all too easy to imagine the reaction to the threat of lengthy prison terms and the forfeiture of inventory and fixtures of all kinds should this Bill be enacted.

We can hardly blame those in the communications business for steering clear of such dangerous waters. Yet recognition of the importance of their activity under our democratic system of government has time and again caused the Supreme Court to build up protections for the exercise of First Amendment rights. In navigating the murky way between protected speech and unlawful speech, the most sacred bulwark for over a half a century has been the rule against prior restraints. The forfeiture provisions in this Bill, which could result in the seizure of unlimited amounts of material entitled to First Amendment protection, are an even more sweeping prior restraint than the infamous law struck down by the Court in Near v. Minnesota.

The supporters of this Bill proclaim its effectiveness because similar procedures have proven successful in the fight against drugs. That truth, however, illuminates the inherent constitutional and practical problem with the legislation. Drugs are immediately identifiable and presumptively illegal. Books and periodicals can only be declared illegal after lengthy court proceedings. Until then, they are presumptively constitutionally-protected. On that foundation, we have fared well as a nation.

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Senator DeConcini. Ms. Florence, let me start with you. I have several questions I would like to submit to you because your statement is thoughtful. This legislation is directed to curb widespread production and distribution of child pornography as well as obscene material. Industries in this business do not seem to be deterred by State and local fines and other minor punishments that appear to be on the books now. State and local law enforcement agencies have been unable to eliminate or reduce the production and the distribution of obscene material and child pornography.

This all being considered, what do you suggest be done to resolve the problem, short of adoption of the forfeiture provision or something in a 2-year prison system? What would you do about it? Just let it go?

Ms. Florence. I think it is difficult to say just let it go. I have no objection or the associations that I am representing have no objection to obscenity legislation or obscenity enforcement, provided it does not threaten protected speech. Certainly going this route is not the way to handle it.

Senator DeConcini. How would you handle it?

Ms. Florence. I would assume that in the local communities, the States can handle their own criminal prosecutions. The Federal prosecutors can come in where necessary or when appropriate based on Federal jurisdiction. But it is the forfeiture provisions that sweep well beyond the target material and that jeopardize all of the legitimate——

Senator DeConcini. But you also oppose the obscenity provisions.

Ms. Florence. Well, basically, the obscenity——

Senator DeConcini. As well as the forfeiture provisions.

Ms. Florence. Well, the obscenity provisions, as you indicated earlier, do not have a new definition of obscenity, so I do not oppose them on that basis. What I oppose is the increased involvement of the Federal Government in an area where for many, many years now, 15, the States have worked this out.

Senator DeConcini. Well, I agree with that basic philosophy. I would like to see the State governments resolve this problem. But when we hear from State governments concerning their inability to proceed in this area, when you see the massiveness of the interstate commerce in child pornography and obscene material, wouldn't you agree that society has a proper petition to the Federal Government?

Ms. Florence. Well, my understanding—and I apologize because I really do not consider myself a legal expert on child protection—is that in the child pornography area there are any number of countless pieces of legislation in effect. Perhaps this could add to them with title I that would bar the use of children, the selling of children, the listing—all of those things. We have absolutely no objection, and it is perfectly appropriate for the Federal Government——

Senator DeConcini. What if that material that is illegal ends up in the grocery store or supermarket? Then your argument is that that though it is illegal, ought not to be a forfeiture because the poor manager, has it thrust upon him to take this material and put it in the racks, so we should not pass that provision.

**Ms. Florence.** I have no objection to the forfeiture of that material. If that material is, in a proper legal proceeding, State or Federal, determined to be obscene, I have no objection to the forfeiture of that material. The infirmity with this legislative approach is that other material will be——

**Senator DeConcini.** Well, what if it is child pornography? Should other material be forfeited if it is truly child pornography where children are used to produce an illegal product?

**Ms. Florence.** I have no objection to having a legal proceeding on every questionable piece of material.

**Senator DeConcini.** But nothing more than that?

**Ms. Florence.** No. As it is found obscene, I have no objection to having it at that point forfeited.

**Senator DeConcini.** But nothing of the other assets of the person that is found to be guilty of having that sort of material?

**Ms. Florence.** Certainly not his other inventory, which would include clearly nonobscene material and maybe some gray material.

**Senator DeConcini.** Mr. Morrow, where do you believe society's interest becomes important enough that we have to take some step to place a greater burden on you as a distributor? You testified that you already kind of exercise censorship yourself. You do not sell things to children, and I applaud that. But where does society have the right to step in and say: This has gone too far; we want you to look at that material; we do not want you to order and sell books that have child pornography in it?

Is that really a good defense?

**Mr. Morrow.** Well, yes, sir. I am a lay person. I sell books in the small town of Vermont, and I look to my legislators to provide the answer to the question that you are asking me. What I am here to testify about is how this particular piece of legislation could possibly affect me or my fellow booksellers in an unfair way.

**Senator DeConcini.** Well, let me just give you this hypothetical. Someone comes in and orders a book. You do not know what it is. And you take the money and send it out, and it is a child pornography book and it comes in.

What is your obligation then? To go ahead and deliver it to the customer or say, I am not going to receive this book; I do not want to have that kind of business?

**Mr. Morrow.** Well, Senator, in that hypothetical case, which has not happened to us, but something analogous has happened, that concerned a book that taught how to make bombs and other terrorist materials. It was a minor that ordered it, and we called the parents in and said, "Do you want your child to have this?" And they did not, of course, and we sent it back. It is a book that we have also ordered for our local police department.

That is the type of decision, I think, that any responsible citizen would have to make, any responsible bookseller as a citizen would have to make on an ad hoc basis. I just would not like to be subject to the kind of penalties that this law, if I made a mistake would impose upon me.

**Senator DeConcini.** You are comfortable with letting the booksellers and their employees make that decision, then, whether or not the material dealt with terrorist activities or dealt with child pornography? You do not think there should be any laws that would restrict that or punish someone who came to a conclusion other than what you did, which was most responsible, and said, here is the book, it came in?

Mr. **Morrow**. I believe that we have no opposition to obscenity laws and agree that what is deemed to be obscene, after due process of law, should not be sold. I am in favor of obscenity laws as the law has developed so far. It is these penalties that scare me.

Senator **DeConcini**. You are in favor of obscenity laws, but you do not want stiff penalties? Is that a fair statement? I mean, you are in favor of antiobscenity laws, restricting obscenity, but you do not want tough penalties?

Mr. **Morrow**. Yes, sir. There can be tough penalties if they are applied in such a way that they specifically do what they are intended to do and are not so broad as to be applied in ways in which they were not intended to be or originally designed for. I believe this law is broad enough so it could be applied easily in ways in which none of us would want it to be applied.

Senator **DeConcini**. You think a law could be drawn that would have tough penalties for people who knowingly sell obscene material that would be satisfactory to you?

Mr. **Morrow**. I do not know the answer to that question, sir.

Senator **DeConcini**. Mr. Klein, you have told us of the chilling effect this legislation would have on your industry in particular, and I understand that you are unable to monitor the contents of every magazine that you or your customers would have. But on the whole, is not that portion of stock that runs the risk of being obscene relatively small?

Mr. **Klein**. Yes. As far as I know, our members and our company in particular have never handled anything that could be judged to be obscene. From time to time, you have publications that are attacked in the local community or whatever. What we do is try to work that out in the local community.

Senator **DeConcini**. If it so small, under good managerial practices, could not something be put into effect to monitor the small amount? What would you say it is? Five percent? Two percent? Ten? Fifteen?

Mr. **Klein**. Well, 5 percent of the magazines that we handle on an ongoing basis might be balancing on that line that you are talking about. But a year-and-a-half ago, when there was a strong objection to an article in Cosmopolitan magazine, I mean, we had no idea of that. We never even thought that that would be an issue.

Recently, there was a particular issue of a magazine in Andover, OH. In past years, not the current year, Sports Illustrated has had complaints about their swimsuit edition.

You have these things coming on occasionally. And what this bill——

Senator **DeConcini**. I am talking about the clearly sexual exploitative magazines or materials that come in. If that is 5 percent, can you not have a marginal managerial apparatus to see whether or not those would be in violation of this law?

Mr. **Klein**. I think it would be physically impossible. Let me describe to you a little bit about what goes on.

TV Guide, for example, just to use an example, they quit their editorial cutoff some time on Friday night. They print on Saturday and Sunday. We receive it at our warehouse at about 5:00 o'clock on Monday morning. We load it directly on to our trucks. All of it is delivered by Tuesday noon. Every magazine——

Senator DECONCINI. Nobody could take a look at that?

Mr. KLEIN. No, we never think of it.

Senator DECONCINI. What about the Playboy or the other sex magazines that come in?

Mr. KLEIN. Every magazine we have is scheduled in that way. The way our industry operates is that way in advance of receipt of the product, the publisher sends us what is called an allotment notice saying how many copies are coming and what date he wants them placed on sale, so it can tie in with his national advertising.

Senator DECONCINI. So what you are saying is this great industry that we have, that you have created here, there is just no way managerially, with all the technology today, there is not any way to have any idea of the 5 percent we are talking about of all your volume could be looked at?

Mr. KLEIN. No. And I think what happens is you——

Senator DECONCINI. I find that very difficult to believe, but I believe you. You are saying it, and you are the witness.

Mr. KLEIN. Let me also add a comment to that. A lot of these titles end up in courts, and courts cannot decide on what is obscene and what is not obscene. In the State of Ohio, there is a prior knowledge provision, and it says you have to have prior knowledge that it was obscene. If there was something like that in the statutes, then at least you would know ahead of time what to distribute and what not to distribute.

We have gone through over the years numerous mechanisms to deal with this. At one time, we looked at everything that had a second class mailing permit. The Post Office used to screen the information. They do not any more.

At one time, we used to have a relationship——

Senator DECONCINI. You would not have prior knowledge if you had not looked at them. So if those materials went through in the way that you have it now, you do not have prior knowledge, do you?

Mr. KLEIN. No. But if we knew that the Post Office refused to give them a second class mailing permit because of that, then we would know not to handle it. They do not do that review any more.

Senator DECONCINI. So we could put it back on the Post Office, on the Federal Government to do it at the Post Office?

Mr. KLEIN. You might be able to.

Senator DECONCINI. Mr. Lynn, on Page 6 of your written testimony, you state, and I quote, ". . . in my view, neither the findings of the Attorney General's Commission on Pornography nor any other events have provided a basis for concluding that . . . new laws are needed at the Federal level." Let me just quote some of those findings.

Between 1981 and 1985, reported child sexual abuse rose by 175 percent; the rape rate increased 43 percent in the last 10 years; the highest incident of rape victims are teenagers between 16 and 19. In recent studies of rapists reveal a correlation between pornography and rape. A 1983 William Marshall study at Queens University, Canada, found that 86 percent of inmates convicted of rape admitted regular use of pornography; 57 percent in the study admitted actual imitation of pornographic scenes in commission of the sex crimes. A 20-year Michigan State police study by Detective Darrell Pope found that 41 percent of all sexual violent crimes in the State involved hard-core pornography either before or during the crime. A study by John Rabun of the National Center for Missing and Exploited Children found that out of 1,400 child sexually exploited cases reported in Louisville, KY, between July 1980 and February 1984, adult pornography was found in all 1,400 cases.

Chief of Police Darrell Gates of the Los Angeles Police Department testified before the Pornography Commission that you so criticized that organized crime controlled 85 to 90 percent of the estimated $7 to $10 billion of the obscenity industry.

My question is simply this: Given the above facts and statistics, how can you come before this committee today and suggest that pornography is not a serious problem and that the Attorney General's Commission—I am not saying it should be canonized either—is not worthy of serious consideration?

Mr. LYNN. Well, I would be happy now or subsequently to respond to each one of those statements, but I think a good example is the very first one that you used: a 175 percent increase in child sexual assault between 1981 and 1985. It has gone up yet again in the last 3 years, as I understand it. This is at a time when the Federal Government itself passed three child protection acts, when every State, subsequent to a decision in the *United States* v. *Ferber*, enacted more and more stringent child pornography laws.

The problem that we have always had with those laws is that they act a little too late in the law enforcement process. They tend to be used against people who received magazines sometimes with photographs depicting children taken 30 years ago. They do not get at the root problem of stopping child sexual assault in the country.

Certainly, something needs to be done about child sexual assault, but I would say it is not passing more laws about child pornography. It is doing at least two other things: One is vigorously enforcing the laws against sexual assault of minors, which are routinely ignored by local, State, and Federal law enforcement officials. Secondly, no one in this area, including people who would like to regulate pornography, dispute the notion that it is essential that young people get some information, whether that is in a public school or church or at home, to explain and to give them a sense of empowerment so that they know what the difference is between being exploited and being loved. Because, frankly, the distinction is lost on many young people, particularly children from very broken homes and very disturbed homes.

I do not think that education and enforcement of the laws against sexual assault of minors raise constitutional problems. They solve the problem, I would say, in a far more significant way than would passing more child protection laws.

In the case of these studies, most of the studies that you mention or the individuals who testified, testified on behalf of their opinions or some study that they did conjointly with their law enforcement efforts. These are not studies that are replicated elsewhere. In fact, the evidence that was used by the Attorney General's Commission did not, I would say, demonstrate that there is a causal connection between the circulation of pornography and rape rates. In fact, quite the contrary.

Senator DECONCINI. Would you refute Chief of Police Gates' testimony before the committee that 85 to 90 percent of pornography is organized crime, is controlled by organized crime?

Mr. LYNN. Well, we have to remember that the commission used an extraordinarily broad definition of organized crime that I think this committee does not adopt. They basically said it is crime if the material might be obscene. That is the crime. And it is organized if they have a truck and a telephone. And I think that really does a disservice to the very hard work in this and other committees to investigate what is truly organized crime.

Senator DECONCINI. Well, would you refute the 20-year Michigan State police study that found that 41 percent of sexual violent crimes in the State involved hard-core pornography either before or during the crime?

Mr. LYNN. Well, I dispute its relevance to this extent: It is not at all surprising that persons who are interested in committing crimes of assault would also be interested in viewing violent material or looking at pornographic videotapes or movies or magazines. That is not surprising.

The question is: Is there a cause and effect relationship or anything close to it? And I know that the gentleman that did the study likes to imply that there is a causal connection. But I do not think that his study does it, and I think the social scientists who testified before the Commission and who submitted documents rebut that contention quite clearly.

Senator DECONCINI. How about the 1983 William Marshall study of Queens University that found that 86 percent of inmates convicted of rape admitted regular use of pornography? Does that tell you anything about——

Mr. LYNN. Yes. It tells me that they are interested in some extraordinarily destructive conduct, but that is not to say that if you took away their pornography they would become Sunday school teachers. I do not think that they would. I do not think that there is any evidence. And, in fact, the evidence is quite to the contrary.

Senator DECONCINI. Well, what about that study also showing that 57 percent of those inmates admitted actual imitation of pornographic scenes in commission of their sex crimes?

Mr. LYNN. Well, Senator, the truth is there is some dispute about this. I am not trying to trivialize this, but there are a limited number of acts in which one can engage in the sexual arena. And for someone to say, well, I engaged in anal sex and I looked at a picture of it—again, I am not sure that that tells us enough to form a conclusion, which can be a very dangerous conclusion, that pornography causes people to act in a certain way. Because if we are wrong about that—and I think we would be if we accepted that premise—then we are really never going to deal with the underlying problems of what causes some tiny fraction of people who look at pornography to also be criminals.

Senator DECONCINI. Yes, but, Mr. Lynn, we are not here trying to solve the problem of what creates this in somebody's mind. What we are here to address is what do we do, if anything, to attempt to reduce the amount of material that might create that kind of situation based on these studies.

Mr. Lynn. No, I understand that, Senator, but we cannot say——

Senator DeConcini. Let us not do anything about that mass of material here, even though we have these studies that people admit that they use this material when they commit the crime and they are imitating it. But given that, we are not here to delve into how do we know what the root cause is. Was it a personality quirk? Was it a problem with their family way back then or somebody misused them or something? We are just here to say is there not a point where society has the right to say, wait a minute, there is enough evidence to indicate some cause and effect. Maybe not enough to satisfy everybody, but certainly enough for reasonable people to look to their Government to do something to shut this industry down.

Mr. Lynn. I think the heart of obscenity law is not that it causes harm to people. In fact, that is why there is criticism from some feminists about obscenity laws. They enforce a sense of moral indignation against the values that are contained in the material, a patent offensive quality to the material. But I think that the social science evidence does not support for reasonable people the conclusion that there is any link, cause-and-effect link between pornography and crime.

I think what the proponents of this legislation this morning have articulated is a sense that society has a right to say: There is too much of this there. We do not really care if it causes people to commit rape or not; we care that it depicts sexuality in a way that is highly offensive to us. It is highly offensive to me.

The question is: What remedy do you use? Do you use Reverend Kirk's, Reverend Kirk saying to people: This is wrong, do not use it? Or do you ask the Government to pass laws?

Senator DeConcini. If we could get a study that you would agree of the cause and effect, then would you think that this legislation or some legislation would be—if that convinced you, that by God, there is just overwhelming proof now before us of cause and effect, what would your response be?

Mr. Lynn. My response would be if it met the standard that is utilized in other first amendment areas—does it present a clear and present danger that actual misconduct will occur?—that then it could be regulated or barred in the same way that you can regulate political speech. But this is sexual speech, and it should not be treated differently, in our judgment, from any other form of——

Senator DeConcini. Is clear and present danger the standard in the *Miller* case?

Mr. Lynn. No, it is not. But I said that if you wanted to reverse this, if one wanted to go back and re-look at this whole question——

Senator DeConcini. You want to set a stronger standard.

Reading your testimony, I was a bit unclear as to your position of title I of 2033. Am I correct to conclude that you are opposed to all of the first title, the child pornography title? The ACLU opposes that?

Mr. Lynn. No, we are not opposed to all of it, but there are certainly sections of this that create problems that are very significant first amendment questions, notwithstanding *Ferber*. That case has been decided. You can do, says the court, a great deal. But the recordkeeping requirement is in Title 1. It says that you have to be aware of the age of models 25 years in the past so that you could not distribute a videotape made 20 years ago unless you could prove that you knew that the models, all of them, were 18; or it would be presumed that none of the models were of age.

I do not think that that is a standard that is adequate under general due process guarantees of the criminal law.

Senator DECONCINI. Well, I have a strong disagreement with you, Mr. Lynn. Thank you very much, ladies and gentlemen.

Mr. LYNN. Thank you.

Senator DECONCINI. Our next panel will be Mr. Alan Sears, legal counsel, Citizens for Decency Through Law; Mr. Kenneth Wooden, National Coalition for Children's Justice; Ms. Carl Lavery, executive director, Victims Resource Center; and Ms. Dixie Gallery.

Ladies and gentlemen, I am sorry, but time is running out here. I am going to submit questions to you instead of asking them on the record because I am 15, 20 minutes late already for my next function. But I will ask that you summarize your statements, if you will. We will start with you, Mr. Sears.

Mr. TAYLOR. Mr. DeConcini, my name is Bruce Taylor, and I was originally invited by yourself to testify here, and Mr. Sears was for some reason left off. So we have decided to share my time.

Senator DECONCINI. Fine.

Mr. TAYLOR. I will share mine with Mr. Sears, if that is OK.

Senator DECONCINI. OK. Very good, Mr. Taylor. Go ahead.

## STATEMENT OF PANEL CONSISTING OF BRUCE TAYLOR AND ALAN E. SEARS, LEGAL COUNSEL, CITIZENS FOR DECENCY THROUGH LAW, INC., PHOENIX, AZ; KENNETH WOODEN, EXECUTIVE DIRECTOR, NATIONAL COALITION FOR CHILDREN'S JUSTICE, SHELBURNE, VT; CAROL L. LAVERY, EXECUTIVE DIRECTOR, VICTIMS RESOURCE CENTER, WILKES-BARRE, PA; AND DIXIE L. GALLERY, DENVER, CO

Mr. TAYLOR. Let me summarize. Mr. Chairman, as you know, I have been a prosecutor of obscenity cases for 15 years and have done over 60 jury trials in several States. I have been before the Supreme Court, two Federal appellate courts. I have done 600 obscenity cases in Cleveland, including a case against Hustler magazine where Mr. George Klein was a witness for the State, meaning that we did not even go after him. As rabid a prosecutor as I was, I never would have touched a wholesale distributor because, one, it was very difficult to prove they had the scienter requirement. They even admit they do not know what is in the magazines. Unless the prosecutor can prove it, we cannot prosecute. Two, even though I have probably one of the broadest experiences in obscenity prosecution, I felt that persons responsible for producing the "mens" magazines, like Hustler's Larry Flint, should be prosecuted first. I do think that the provisions of this bill are constitutional and the reason that they are needed is that the Federal obscenity statutes have not been amended in over 30 years. They certainly are subject to the different technological and methodological changes that have happened in the industry.

In the early 1970's in this industry, the hard-core pornography was practically 100 percent taken over by organized crime families and their associates. When we say "organized crime," Mr. Lynn, we are talking about La Cosa Nostra, Mafia, "Godfather" movie-type of organized crime. They still control all the hard-core pornography. They do not have as much to do with the soft-core magazines like the American Booksellers and the Media Coalition are talking about. Frankly, I do not know why those people are here. There has never been a Federal case against any of those kinds of businesses, and there never will.

As you know, as a former prosecutor, and I know Senator Leahy of this committee is also a former prosecutor, there are a lot of provisions of the "court made law" that apply to these provisions of law, even though they are not in the statutes—due process provisions, equal protection, fourth amendment, prior restraint, first amendment considerations.

Those are the reasons that this supermarket scenario can never happen. There are already court cases that say you cannot seize all the inventory of a business even if you do find not just one magazine, but several obscene magazines. If they found one child porn magazine, they would not let you seize a whole supermarket. That is by court-made law. That applies here to these statutes. And when they come in here and make up these hysterical hypotheticals, they are lying to this committee. I think it is an affront for them as lawyers to take an oath to uphold and interpret laws fairly and then make up these ridiculous stories. They already know that the courts would prohibit prosecutors, even if we wanted to, from doing those kinds of abuses.

This bill does not change the kind of materials that will be obscene. It does not change the reach of the Federal laws. It just changes the way that certain obscenity offenses are proven in court. The burden is still on the Government. We have to prove scienter. There is no way that these abuses, that any of these witnesses have said can happen, would happen.

I would just add my opinion that these laws are constitutional and urge the committee to adopt them.

Senator DeConcini. Mr. Sears.

Mr. Sears. Senator DeConcini, I also on behalf of Citizens for Decency Through Law thank you for your support of this legislation, your cosponsorship, and these hearings today. I want to comment very briefly regarding the work with the Attorney General's Commission on Pornography that I was Executive Director of.

You have before you, and each member of this body in this Senate has before them a 2,000-page report issued by the Attorney General's Commission on Pornography. I am sure you and many other Senators have spent hours poring over it. You yourself were present and testified at the hearings, as did a number of members of this Judiciary Committee. We have thousands of pages of transcript that are in the Federal Archives that have been distributed to many members on the Hill.

I believe that we basically have come to the position that you yourself stated earlier this morning, Mr. DeConcini, that we have heard enough testimony on some of the underlying issues. As Senator Grassley observed, we have heard of the problems in enough detail; now it is time to get on with solving the problem.

As Jerry Kirk mentioned earlier today, three out of four Americans have been demanding, in polls conducted not for right-wing groups, but for Time magazine, for Newsweek, for "ABC News," for the Gallup organization—three out of four Americans have been demanding a crack-down by the Government against hard-core pornography. More than 90 percent are demanding a crack-down regarding child porn.

The 92 recommendations of the Attorney General's Commission on Pornography were not hysterical reactions, but they were basically effective designs to deal with specific problems. There were three guidelines in drafting all of those recommendations. First of all, nothing radical. Everything was to be based upon a prior formulation that had been proven. For example, the forfeiture law which has been the subject of a lot of discussion was modeled after forfeiture laws already used in Title 21 with narcotics, used with the gun laws, used with counterfeiting, and many other provisions of Federal law. The statute is drafted and, before this committee today, tracks already constitutionally sound techniques.

The second drafting guideline was that everything would be clearly constitutional, and every recommendation was scrutinized not only by many outsiders who commented, but members of the Commission who were law professors, including Fred Schauer, probably one of the most quoted law professors in the country by the United States Supreme Court, author of probably the number one treatise on obscenity law.

And the third guideline was that the recommendations would be effective, that they would really deal with real problems.

This bill that is before you today is not a carbon copy of the Commission's recommendations. There are some minor differences. But bottom line is S. 2203 will work; it will solve real world problems.

S. 703 regarding the victims' bill is a very important bill as well.

I would like to submit for the file of this committee a copy of "Pornography Victims," which is a recitation of the transcripts of a number of the witnesses who testified before the Commission in total. I think any fair-minded person reviewing these transcripts would know that there needs to be a remedy. This provides it.

I would like to comment in answer to one of your earlier questions, Senator, and then my time will be up regarding the recordkeeping provision.

Senator DECONCINI. Your time is up but go ahead.

Mr. SEARS. Thank you.

During the hearings of the Commission, this recordkeeping provision was discussed with numerous witnesses. And I note in my written testimony that Prof. Alan Dershowitz of Harvard University, not noted for his right-wing views, to say the least, stated as follows:

"My personal view is that every magazine should be required to get consent forms of models who participate in this kind of activity." And not reading the entire quote, he goes on to say that to establish the issue of voluntariness and consent that the burden would not be too great to impose on the magazine publishers in this country.

When we put children at risk, I think it is absolutely appropriate to require those that engage in the activities do something to protect them.

We would be glad to, of course, respond to all your questions in writing, Senator.

[The prepared statement of Mr. Sears follows:]

Citizens for Decency through Law, Inc.

Statement of

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For The

U.S. Senate Judiciary Committee

June 8, 1988

On

S. 2033

Child Protection and Obscenity Enforcement Act of 1988

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CDL Founded 1957

## SUMMARY OF TESTIMONY

Citizens for Decency through Law, Inc. strongly urges Congress to enact all of the provisions of this legislation. The changes and additions to existing federal law contained therein are absolutely essential if the traffic in obscenity and child pornography conducted in this country by organized crime is ever to be curtailed.

Congressional intent against the sexual exploitation of men, women and children has been explicitly clear over the course of this century. United States Supreme Court recognition of the complete lack of First Amendment protection for obscene material is over thirty years old and has been only strengthened in subsequent Court pronouncements. And yet the illegal market in obscenity and child pornography was allowed to develop into its current multi-billion dollar magnitude because of a wholesale neglect on the part of most United States law enforcement officials over the last twenty years. All the while, the relatively tame materials available twenty years ago have degenerated to a level that deeply shames any caring human being. Congressional will against obscenity and child pornography, which reflects the opinion of the vast majority of citizens in this country, can still be achieved. Now, however, only measures sufficient to attack organized crime can succeed. This legislation contains those measures.

For the most part, this written testimony has left the advancement of policy arguments supporting this legislation to the Justice Department, concerned citizens and citizen groups. We wholeheartedly agree with the many that we have reviewed, including those of the Justice Department and those of many of this country's religious leaders. We trust that Congress will find them completely persuasive. CDL has, therefore, restricted itself to testifying to the creation of and the reliability of the Attorney General's Commission on Pornography, from which most of this legislation originates, and the constitutionality of each of the sections of this act.

In summary, CDL testifies that the Attorney General's Commission on Pornography was well conducted by thoughtful, intelligent men and women who were both knowledgeable of and sensitive to all of the different aspects, including constitutional ones, associated with the issues of obscenity and child pornography. And, further, CDL testifies that the provisions contained in this act are consistent with and permissible under the Constitution of the United States.

Mr. Chairman and Members of the U.S. Senate Judiciary Committee:

Thank you for your invitation to appear before this Committee in support of the Child Protection and Obscenity Enforcement Act of 1988. S.2033 is an important Bill and you should give it your highest priority.

This legislation proposes to amend various sections of the United States Code. As amended, the new law will: (1) prohibit interstate or foreign transmissions by computer of child pornography or advertisements and solicitations for child pornography; (2) prohibit the buying or selling of minors for the production of pornography; (3) require record keeping by producers of any pornography depicting "actual sexually explicit conduct;" (4) include sexual exploitation of children in the definition of "racketeering activity" in the federal R.I.C.O. statute; (5) prohibit the receipt or possession for sale or distribution of obscene matter which has been transported in interstate or foreign commerce, providing certain presumptions regarding the interstate transportation of the obscene matter; (6) allow forfeiture in obscenity cases; (7) prohibit obscenity on cable television; (8) amend the Communications Act of 1934; (9) prohibit possession and sale of obscene matter on federal property; (10) include obscenity offenses to the list of crimes for which the government may seek a court order authorizing electronic surveillance. This statement will demonstrate the need for these amendments and will provide supporting legal authority for enactment of this legislation.

## I. THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY AND ITS RECOMMENDATIONS.

From 1981 to 1985, I was an Assistant United States Attorney and became Chief of the Criminal Section of the United States Attorneys Office for the Western District of Kentucky (Louisville). During that tenure, I successfully convicted two of the largest distributors of obscenity in the world--the Cleveland based Sovereign News Company and General Video of America--of federal felony charges along with several other employees. I have also assisted in numerous other federal, state and local prosecutions in obscenity matters.

On May 22, 1984, President Reagan requested that Attorney General William French Smith establish a Commission on Pornography. The Commission, established in June 1985, was "...to determine the nature, extent and impact on society of pornography in the United States and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." Attorney General's Commission on Pornography, Final Report, Appendix A (1986)(Commission's Charter).

The Commission, acting within the mandate of its charter, studied the dimensions of the problem of pornography with the main emphasis on visual and graphic pornography. The Commission studied changes in the nature, volume, media forms, production and distribution of pornographic materials that have occurred "over the last several years." Id. The study included two topics, child pornography and the role of organized crime in the business of pornography, not covered in the 1970 Presidential Commission on Pornography. The Commission reviewed the available empirical and scientific evidence on the relationship between exposure to pornography and antisocial behavior, and evidence on the impact of the creation and dissemination of adult and child pornography upon children. Federal, state and local laws regulating pornography were also reviewed and recommendations were made for further constitutionally valid controls.

From March 1985 to July of 1986, I was Executive Director of the Attorney General's Commission on Pornography. As Executive Director, I was responsible for selecting and supervising the staff, managing the six public hearings, preparing of the Final Report and oversight of all activities of the Commission.

Each member of the former Congress was provided a copy of the Final Report of the Attorney General's Commission on Pornography in July of 1986. As you and your staffs reviewed the document, I am sure that you found little resemblance to what its critics had said about it before release.

During the course of eighteen months, the Commission received and reviewed copies of every published study from the social sciences, every published Law Review article on related subjects, hundreds of submitted written statements, thousands of citizen letters, listened to the testimony of more than 200 witnesses at six public hearings across the United States conducted in Washington, D.C., Chicago, Illinois, Houston, Texas, Los Angeles, California, Miami, Florida, and New York, New York. The witnesses represented every relevant profession, philosophical viewpoint and interest. The Commission and its staff interviewed, indepth, more than 100 persons who reported victimization. I will note for the record that representatives of the American Civil Liberties Union and various related groups had more opportunities to testify than any other single organization.

From July 1986 to the present, I have been involved with more than 400 public appearances, interviews, and training sessions in 36 states. I have met with thousands of citizens, hundreds of prosecutors, Justice Department officials, police officers, victims, victims assistance coordinators, care providing professionals, and many others. In these past three years, I have interviewed scores of victims, victim family members, offenders and investigators. I am currently legal counsel with Citizens for Decency through Law, the nations oldest and largest legal resource on obscenity law and related First Amendment issues. In such capacity, I have been involved with training more than 2,000 federal, state and local police officers and prosecutors and assisting scores of such officials with obscenity enforcement matters. My experiences have only served to reconfirm the findings and recommendations of the Attorney General's Commission on Pornography.

I want to review briefly with you the key findings of the Attorney General's Commission on Pornography as they are pertinent to the focus of this hearing.

## A. Content.

The Commission found that there was a dramatic change in the content of pornography from 1968, when a previous Commission studied the subject, and that readily available in 1985. The content has deteriorated to extremely explicit depictions of sadomasochism, torture, racism, rape, bestiality, and many other incidents of degradation, subordination, humiliation and victimization of women. "Adult" material is now, almost exclusively, hard-core pornography. In 1968, these materials were only a minute fraction of the commonly available commercial pornography market. The Attorney General's Commission staff conducted a survey of the contents of sixteen pornographic outlets in six major cities with spot checks all across the country. The study conducted under rigid social science guidelines confirmed the suggestions of the witnesses that the most significant portion of the commercial pornography market today centers on degradation, subordination and violence. An article about this study, co-authored by Dr. Park E. Dietz, University of Virginia Law and Medical facility and myself has been accepted by and will be published in the University of Michigan Law School's Journal of Law Reform this fall. One of many findings in the study was that, "less than 10 percent of the materials depict normal heterosexual activities between a man and a woman, and less than half of these depict vaginal intercourse."

B. Consumers.

In 1968, the first Commission to study this subject on a national level commissioned original research to determine who the consumers of pornography were. In Technical Volume VI of that 1970 Commission Report, the finding was that the largest category of consumers were adolescents. In examining social science research conducted in the 1970's, 1980's and reviewing the real world experiences as reported by thousands of persons, it appears that the conclusions of that earlier Commission are still valid in that the largest category of consumers of pornography in America are minors. This is in spite of laws and practices by distributors that prohibit initial sale of this material to children.

Just last week we received another survey, this of high school students in one of our nations top schools, which reported that 70% of the kids had seen a highly explicit hard-core video and that from these they learned "how to do" sex.

The total effect as to consumption by children is unknown, however, both the earlier Commission and the 1986 Commission concluded that pornography could have a serious harmful effect on the mind of a child. It was a conclusion of the 1986 Commission that pornography when exposed to young children, as it is in America today, could have a substantial impact upon the way they viewed sex, marriage, women, and the conduct of men in our society toward these important social relationships. Common sense as well as a significant body of experience confirms this proposition.

Based upon these findings all of the discussions about so called "consenting adults" seem a bit out of synch with reality.

C. Size Of The Problem.

When the earlier Commission concluded its work, it found that the pornography industry only involved a couple hundred million dollars. In the 1980's, this industry has expanded to the point that reasonable estimates suggest the industry handles somewhere in the neighborhood of eight billion dollars annually. Although the majority of this cash flow is probably laundered money from narcotics, gambling, and prostitution, the actual consumer expenditures still amounts to probably two billion dollars, when considering all forms of pornography such as men's magazines, hard-core films, video cassettes, peep shows, cable, subscription TV, and dial-a-porn. The problem of pornography consumption and access to pornography has magnified tremendously in that pornography is now available in virtually every neighborhood through video cassette rental outlets, cable and pay television access, and "dial-a-porn" telephonic communications.

It is noted that "dial-a-porn" telephonic communications are intensely targeted toward teenagers who consume millions of dollars of this material annually. I am thankful that each member of this committee played a role in the nearly unanimous vote for the Dial-A-Porn legislation which will take effect in July of this year.

D. The Public Health.

The Commission concluded that there are many serious public health concerns accompanying the distribution of pornography that drastically affect the health of women in this country. Found in almost every so-called "adult bookstore" are the peep-show booths wherein men enter, deposit quarters to watch fragments of films, and then engage in anonymous sexual activity with persons on the other side of the booth. It was found that many of these men engage in relations with as many as three or four other persons a night. It was further found that contrary to popular belief, this is not limited to the population of homosexual males in our society but indeed includes many heterosexual males, includes many married men who after having anonymous sexual activity and exposing themselves at great risk to sexually transmitted diseases, including Acquired Immunity Deficiency Syndrome (AIDS), then return to their homes and further transmit these diseases to their innocent family or girl friends. A significant number of women reported that they were unaware that their spouse or boyfriend frequented such establishments and engaged in such sexual practices until after they had contracted these diseases. The source of the sexually transmitted disease was unexplainable until the male admitted his activities in the bookstores. Attached hereto as Exhibit A is the Statement of Commission member Park Elliott Dietz, M.D., M.A., PH.D. (AGCP: Vol. I, pp. 37-53;) regarding seven significant public health concerns relating to pornography in our society. You will note that each of these concerns is of particular concern to the health and safety of women as well as all members of our society.

## E. Constitution and Legal Issues.

The material which is commonly called "hard-core" pornography, obscene material and child pornography, has never had protection under the First Amendment of the Constitution of the United States. In explaining how to define the lines of demarcation, the United States Supreme Court in 1973 stated that it was "categorically settled" that such material was not protected speech. Obscene material and child pornographic material are akin to many other types of speech that are not protected under the Constitution such as libel and slander, statements in furtherance of conspiracies, statements in writing relating to mail, consumer, or wire fraud.

It was further found by the Commission that when constitutionally sound laws are enacted by legislatures with adequate penalties, and are effectively enforced by police and prosecutors, that such laws work. Entire communities in the United States, including major and medium size metropolitan areas, have rid themselves of all pornographic outlets and all commercial sales of illegal obscene material. Cities that have been successful in this area, and are virtually free of hard-core material at this time, include Fulton County (Atlanta), Georgia; Cincinnati, Ohio; Newport, Kentucky; Norfolk and Arlington County, Virginia; Buffalo and Westchester, New York; Fort Wayne, Indiana; the entire State of Utah; Omaha, Nebraska; New Orleans, Louisiana; Oklahoma City, Oklahoma; Charlotte, North Carolina; Jacksonville, Orlando, and Fort Lauderdale, Florida. Miami, Florida has gone from twenty three hard-core outlets to eight in the last few years through law enforcement. Cleveland went from 56 porn theatres and bookstores to 13, and Indianapolis is down to six.

It was noted, however, that on the federal level at the time of the Commission's work that the United States Department of Justice had done little to go after the major distributors of this material on an interstate level in the past fifteen years, with the notable, and successful, exception of the MIPORN cases of the Miami Strike Force. I am pleased to note today that a significant number of the recommendations of the Attorney General's Commission on Pornography have already been implemented within the U.S. Department of Justice. A Task Force of trained obscenity law prosecutors is in place, training sessions have been implemented through Law Enforcement Coordinating Committees and a major increase in investigative and prosecutive activity has occurred.

As will be discussed in more detail, later in this statement, the Commission found that federal law had a number of loopholes and did not provide federal law enforcement officials with all of the enforcement tools needed, and, therefore, the Commission made a number of recommendations for amendments to present federal law which are, in part, met by the legislation before you today.

F. Organized Crime.

It was the Commission's conclusion that there is virtually no distribution of obscene, illegal material on a significant multi-million dollar, interstate level that is not controlled directly or indirectly by members, associates, or other affiliates of organized crime both traditional and non-traditional. The related victimization of women, crimes relating to pornography and other organized crime use of pornographic profits are almost numberless. Such harms to our society and to the women of our society include harms relating to prostitution, damage to families and women include gambling, murder, acts of physical violence, extortion, public corruption, firearms violations, all manner of vice and many other crimes, as well as the obvious strain on the family by increased divorces and sexual diseases.

## G. Social Science Evidence.

The Commission was very cautious in its review of social science findings in that the Commission concluded that social science could not provide "definitive" proof on many of the issues in question. The Commission divided the literature and the analysis of pornography, into five categories. The first category was child pornography, and the Commission had no difficulty in establishing that this material was harmful. The second area the Commission examined was material defined as "sexually violent material." This material involves the sexualization of violence. The Commission found, based upon the literature, that such material had an impact on our society in many significant ways, including acceptance of rape myths, and the degradation of the class and status of women. Further, it was found that consumption of obscenity led to a modeling effect (which suggest that once a viewer sees items or activities depicted, that the individual tends to act out some of the imagery), and other effects on family and society. The Commission had no trouble in finding that negative effects were found to have been demonstrated and quoted at length from the work of numerous researchers. The third category the Commission dealt with was sexual activity without violence but with degradation, submission, domination, or humiliation. The Commission made the same findings based upon social science research as previously stated for violent material. The Commission found substantially less harm for material that contained sexual activity without violence, degradation, submission, domination, or humiliation or mere nudity without force, coercion, sexual activity, or degradation. A recent study of non-violent materials finds that the Commission might fairly be criticized for understating the evidence of harm previously found by social scientists. Dr. James Weaver of the University of Kentucky sets out his original research and analyzes the work of other researchers in an unpublished dissertation entitled, "EFFECTS OF PORTRAYALS OF FEMALE SEXUALITY AND VIOLENCE AGAINST WOMEN ON PERCEPTIONS OF WOMEN" submitted in July, 1987, to Indiana University. Dr. Weaver's conclusion and summary, set out at pages 85-91 of his dissertation is attached hereto as Exhibit B and made a part of this testimony, with the consent of Dr. Weaver. I ask that this summary be printed in the record as part of my statement, since this information is not readily accessible by the public.

H. Production And Distribution.

The Commission found that the industry's abuse of the performers was systematic and incredible. Women, without any concern by producers for their health and safety, were subjected to multiple acts of prostitution with multiple partners in very short periods of time. No precautions are taken by the "industry" to protect the health of the performers in any significant fashion. Attached hereto as Exhibit C, and made a part of this statement, is an article written on behalf of the Commission relating to the use of performers in commercial pornography. (AGCP: Vol. I, 837-900). It is also noted that three of the nations "best known" male pornography performers, John Holmes, Steve West and Steve Scott, have died of A.I.D.S. within recent months, all of whom had sexual activity with thousands of other performers.

I. Forms Of Victimization.

As I stated earlier, the Commission received hundreds of accounts of victimization. Subsequent to the Commission's work, I have received several hundred additional accounts both in written form, interview form, and from personal investigative experience. I have talked to countless police officers, social services workers, family counselors, ministers, priests, and many other professionals relating to abuses relating to pornography. The Commission in its Report appended brief extracts of some of the accounts received by the Commission, which is attached hereto as Exhibit D. (AGCP: Vol. I, pp. 767-835). Harms found by the Commission were divided into three categories: physical harms, psychological harms, and social harms. Enumerated harms include both the force against women in the industry and of persons who were subjected to the use of pornography in numerous ways. Det. Michael Krzeninski with the Sexual Assault Unit of the Milwaukee City Police Department reported to me earlier this week: "In the early 1980's, sexual assaults encountered in Milwaukee were "soft-core" type of assaults. There wasn't a lot of abuse of the victim. Now, rape victims are suffering more and more degradation and abuse by men who are imitating what they saw in hard-core pornography." Krzeninski told me how victims identified publications that were produced at the time of the rape, phrases were used that were consistent with what was then commercially available in the local Milwaukee pornographic outlets, and other evidence of modeling effect. Many victims of rape have given similar accounts to me personally. Another form of rape is that of the spousal rape where a person married to the victim acted out scenes depicted in pornography. There were many other physical harms that would not necessarily meet the legal definition for spousal rape that involve physical violence against one married to the offender as a result of pornography. Other physical harms included forced sexual performance and sadism reported by scores of women. I believe this is one of the most significant occurrences in relation to pornography. Other physical acts included battery, torture, murder, imprisonment, transmission of sexually related diseases, masochistic self-harm, prostitution, and others. Psychological harms included suicidal thoughts and behavior, fear and anxiety caused by seeing pornography, feelings of guilt and shame, fear of exposure through publication or display of pornographic materials, amnesia and denial and repression of abuse, nightmares, compulsive reenactment of sexual abuse and inability to feel sexual pleasure outside of a context of dominance and submission, inability to experience sexual pleasure and feelings of sexual inadequacy, feelings of inferiority and degradation, feelings of frustration with the legal system, abuse of alcohol and other drugs. Social harms included loss of job or promotion and sexual harassment, financial losses, defamation, and loss of status in the community, promotion of racial hatred, loss of trust within a family, divorce, promiscuity, compulsive masturbation, prostitution, and sexual harassment in the workplace. Rather than spending a great deal of time speaking about individual examples of these, the words of the women speak for themselves. I think one of the most significant things that the Commission did was to remove the veil of silence from the women of America. We now know that thousands upon thousands of women have been battered and abused as a direct consequence of pornography.

## SUMMARY

The Attorney General's Commission did what is was commissioned to do. It studied the nature, extent and impact on society of modern day pornography in the United States, and it made specific recommendations to the Attorney General, to the State, to local governments and to citizens of the United States concerning more effective, constitutionally permissible, ways to deal with the serious problems and abuses. For the most part, only those with a vested interest in the business of pornography or the 2-4 percent of our population whose ideology would require First Amendment protection for even child and torture pornography refuse to see a social problem with, at least, some forms of pornography. To anyone else who has taken the time to read the Final Report, the Commission's definition of and delineations of the types of pornography and the careful, reasoned recommendations given by it make a lot of sense. As I stated earlier, some of what the Commission called for is already in place, namely the Justice Department's creation of an obscenity law resource center and a task force of trained obscenity law prosecutors, also, the recently enacted federal prohibition of dial-a-porn, removal of gender from the Mann Act and inclusion of forfeiture powers for the postal service. The recommendations contained in this legislation, now before Congress, are those that the Administration and the Justice Department view as vital if this Congress is truly interested in curbing the traffic in illegal, harmful obscene materials.

## II. CONSTITUTIONAL ANALYSIS OF THIS LEGISLATION.

### A. Section 101. Amendments to existing offenses.

This section would amend existing Sexual Exploitation of Children statutes in three ways. Subsection (a) would prohibit, in interstate commerce, the use of computers to advertise, distribute or receive child pornography or the use of computers for the purpose of soliciting minors for the production of child pornography. Congress intended this result when it passed the child pornography statutes. See H.R. Rep. No. 99-910 accompanying H.R. 5560. This amendment makes that intent explicit. Subsection (b) prohibits, in interstate commerce, the transportation, shipment, receipt, distribution or reproduction for distribution of any visual depiction of child pornography by means of a computer. Subsection (c) gives "computer" the same definition as that used in the Computer Fraud statute, 18 U.S.C. § 1030.

There can be no successful constitutional challenge to these amendments. As will be discussed more fully later in this text, the United States Supreme Court views as "compelling" the governmental interest in protecting the physical and psychological well-being of minors. New York v. Ferber, 458 U.S. 747, 756-7 (1982). This is so because, "A democratic society rests for its continuance upon the healthy, well-rounded growth of young people into full maturity as citizens." Id. at 757 (Court quoting from Prince v. Massachusetts, 321 U.S. 158, 168 (1944)). Therefore, the Court has sustained legislation aimed at protecting minors even when the laws have operated in sensitive areas of constitutionally protected rights. Id. These amendments simply make clear that the newer technology of the computer will not be allowed to circumvent already valid regulations prohibiting the sexual exploitation of children.

This legislation was recommendation number 39 of the Attorney General's Commission on Pornography (AGCP). See AGCP Final Report, Vol. I, p. 443 (attached as Exhibit E).

B. Section 102. Selling or buying of children.

This section would create new offenses for "selling or buying of children" for sexual exploitation purposes. The section also sets forth the jurisdictional circumstances for the new offenses, and it defines a key term, "custody or control" to include temporary supervision over or responsibility for a minor whether legally or illegally obtained.

As with the prior section, there can be no successful constitutional challenge to this section.

This legislation was recommendation number 43 of the Attorney General's Commission on Pornography. See AGCP Final Report, Vol. I, p. 444 (attached as Exhibit F).

C. Section 103. Record keeping requirements.

This section would add a new provision to the sexual exploitation of children chapter which would require producers of sexually explicit material to ascertain the ages of all performers engaged in "actual sexually explicit conduct." The section requires the keeping of records which reveal the identity and age of all performers involved in such conduct. The provision is self-enforced by the threat of two rebuttable presumptions in the event of any prosecution for sexual exploitation of children. Jurisdictional prerequisites are listed and key terms are defined.

Current law prohibits the use of anyone under the age of eighteen in actual or simulated "sexually explicit conduct." However, it is often impossible to prove that an "older looking" adolescent was, in fact, a minor during the production. This section will protect not only minors, but the producers who claim not to know, themselves, that a performer is less than eighteen years old. See United States v. Kantor, 677 F.Supp. 1421 (C.D. Cal. 1987), arising out of the case of pornographic film "star" Traci Lords who began making hard-core movies at the age of 15. Through use of the rebuttable presumptions, this section will make possible the prosecution of those producers who do use minors in their sexually explicit works.

The record keeping requirements in this section are not unduly burdensome. Producers of material depicting "actual sexually explicit conduct" who use only performers appearing over eighteen are not going to face prosecution for sexual exploitation of children and, so, may disregard this section's requirements. In the unlikely event that a prosecution began because some performers' ages appeared questionable and the presumption of minority was used, the presumption could easily be rebutted by the introductions of each performers' birth certificate or other indication of age and identity. Also, the requirement only applies when actual sexually explicit conduct is depicted. There is no record keeping requirement for film or other works depicting only simulated sexually explicit activity. Therefore, the only producers "burdened" by this record keeping are those who create "hard-core" sexually explicit material and employ performers who could be underage. Under these circumstances, the record keeping requirement is neither unduly burdensome nor unconstitutional.

The United States Supreme Court has termed the interest in safeguarding the physical and psychological well-being of a minor as "compelling" and has declared this compelling interest, "evident beyond the need for elaboration." New York v. Ferber, 458 U.S. at 756-7. Also, the Court viewed the prevention of sexual exploitation and abuse of children as constituting "a government objective of surpassing importance." Id. at 757. The Court explicitly held that child pornography is "unprotected speech subject to content-based regulation." Id. at 765 n.18. Therefore, Congress may single out material which likely involves child pornography and prescribe reasonable regulations which are narrowly drawn to serve the compelling governmental interest in protecting children from sexual exploitation. To say that until a material is adjudicated as either obscene or child pornography, it is presumed protected and immune from any governmental regulation based on its content reaches an absurd result, one that would leave Congress impotent to ensure compliance with laws that the Congress had constitutional authority to enact. In addition, this absurd assertion runs contrary to numerous Supreme Court decisions. Cf. Young v. American Mini Theatres, 427 U.S. 50 (1976)(content-based "dispersal" zoning ordinance upheld); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) (content-based federal "indecency" regulations upheld); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (content-based "concentration" zoning ordinance upheld).

It is noted that persons of many diverse philosophies have endorsed this concept. Professor Alan Dershowitz, Harvard Law School, has stated;

> My own personal view is that every magazine should be required to get consent forms of models who do participate in this kind of activity and I for one -- here, I have to say I have not spoken to my client on this and so I am speaking as an individual. I for one would be in favor of legislation that would require that if photographs are taken in the United States of America of American people, that consent forms should be required. That, it seems to me, is not an issue in the law of pornography, it is an issue on the law of voluntariness and consent. I should say the same thing would be true of nonpornographic material of portrayals of torture and violence in a nonsexist manner or other pictures as well. I think consent is a very important part of freedom, and Commissioners, on this one I think you and I agree, we all want to increase volunteerism and decrease lack of consent, whether that be by models or purchasers of magazines.

Transcript of Hearing, AGCP, U.S. D.O.J., Jan. 21-22, 1986.

This legislation was recommendation number 37 of the Attorney General's Commission on Pornography. See AGCP Final Report, Vol. I, p. 443 (attached as Exhibit G).

D. Section 104. R.I.C.O. amendment.

This section would add sexual exploitation of children to the list of predicate offenses under the definition of "racketeering activity" in the federal R.I.C.O. statute.

The federal R.I.C.O. statute, in general, has passed all constitutional challenges. See, e.g., United States v. Turkette, 452 U.S. 576 (1981); United States v. Vignola, 464 F.Supp. 1091 (E.D. Pa. 1979), aff'd without op., 605 F.2d 1199, cert. denied, 444 U.S. 1072; United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050, reh'g denied, 424 U.S. 950. Therefore, the only question raised by this legislation would be the constitutional validity of sexual exploitation of children as a predicate offense. No direct legal authority yet exists to decide the question. Next term, the Supreme Court will hear constitutional challenges to obscenity as a predicate offense in a state R.I.C.O. statute. See 4447 Corporation v. Goldsmith, 504 N.E.2d 559 (Ind. 1987), cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana, 56 U.S.L.W. 3608 (U.S. Mar. 8, 1988)(No. 87-470). CDL is confident that the Supreme Court will uphold obscenity in R.I.C.O. cases. See also United States v. Pryba, 674 F.Supp. 1504 (E.D. Va. 1987), in which the only federal court to consider the question, so far, upheld obscenity R.I.C.O.

But whatever the outcome, Fort Wayne will not be binding - on the question of sexual exploitation of children as a predicate offense in R.I.C.O. because of the differences in child pornography and obscenity as the law views them and the different governmental interests involved in regulating the two. See New York v. Ferber, 458 U.S. 747. The governmental interest in protecting children and helping to ensure their physical and psychological well-being is of the highest magnitude. Id. at 756-7. Only a few interests rank above it. Congress, as well as independent research, has found that the use of children in pornography is very harmful both to the children and to society. Id. at 758 n.9. Fifteen states have already added child pornography to their own R.I.C.O. statutes. The prosecutorial tools available in R.I.C.O. could not be viewed as unreasonable means for achieving so important a governmental objective. Therefore, the addition of sexual exploitation of children to the list of R.I.C.O. predicate offenses would most likely pass even strict First Amendment scrutiny. That child pornography is wholly outside First Amendment protection ensures the constitutionality of this amendment.

### E. Section 201. Receipt or possession for sale; presumptions.

This section would make various additions and amendments to the current federal obscenity statute, 18 U.S.C. § 1461 et seq., and one amendment to the federal Interstate Travel in Aid of Racketeering statute, 18 U.S.C. § 1952. Subsection (a) would add a new section proscribing receipt, or possession with intent to distribute, of obscene material which has been shipped in interstate or foreign commerce. It also would provide harsher penalties for persons convicted of subsection (a) who are "engaged in the business" of selling obscenity. Subsection (c) would prohibit the knowing use of a facility or means of commerce for the purpose of interstate or foreign sale or distribution of obscene matter. Subsection (d) would create a new section providing for rebuttable presumptions that obscene material produced or manufactured in one state or foreign country and found in another state was transported in interstate or foreign commerce. Subsection (e) would amend 18 U.S.C. § 1952 to include obscenity in its list of business enterprises covered in the act's definition of "unlawful activity."

All of the provisions contained in this section are fully within Congress' power under the Commerce Clause of the United States Constitution, art. I, §8, cl. 3. See generally Duncan v. United States, 48 F.2d 128 (9th Cir. 1931)(obscenity law viewed as constitutional exercise of power of Congress to regulate interstate commerce), cert. denied, 283 U.S. 863. Congress has a legitimate interest in protecting the public commercial environment by preventing obscene materials from entering the stream of commerce. United States v. Orito, 413 U.S. 139, 143 (1973). Furthermore, comprehensive federal regulation of interstate transportation of obscene material by Congress is constitutionally permissible. Id. Because obscenity is unprotected by the First Amendment, Congress need only determine that such regulation is reasonably necessary to effect permissible federal control of interstate commerce in obscene material. Id. Congress has already decided to outlaw the interstate transportation of obscene materials. That is the obvious purpose of federal obscenity laws. See generally United States v. Alpers, 338 U.S. 680 (1950). The amendments and additions contained in section 201 of this legislation serve only to effectuate the will of Congress.

Critics of this legislation can only raise an issue of federalism regarding what they perceive to be an expansion of federal jurisdiction. But, of course, such an issue does not raise any constitutional objections to this legislation. See generally United State v. Hill, 500 F.2d 733 (5th Cir. 1974) (unconstitutional state statute not relevant to federal prosecution), reh'g denied, 503 F.2d 1403, cert. denied, 420 U.S. 952; United States v. Harding, 507 F.2d 294 (10th Cir. 1974)(contemporary community standards did not require that state laws would govern federal obscenity prosecutions), cert. denied, 420 U.S. 997; United States v. Danley, 523 F.2d 369 (9th Cir. 1975)(availability of obscenity to adults under state law did not prohibit federal court finding that material in question affronted contemporary community standards and was, therefore, obscene under federal statute), cert. denied, 424 U.S. 929. If a state declines to proscribe the production and dissemination of obscenity within its borders, Congress still retains the power, under art. I, § 8, to protect the public commercial environment and to ensure that none of that or another state's obscenity enters the national stream of commerce. Smith v. United States, 431 U.S. 291 (1977).

This legislation was inspired by recommendation number 2 of the Attorney General's Commission on Pornography. See AGCP Final Report, Vol. I, p. 433 (attached as Exhibit H).

### F. Section 202. Forfeiture in obscenity cases.

This section would apply most of the criminal and civil forfeiture laws now available in prosecutions for narcotics, illegal firearms, illegal gambling and other various illegal activities to all obscenity and child pornography violations. These forfeiture provisions include (1) mandatory, instead of discretionary, forfeiture, (2) ex parte preindictment restraining orders, (3) prerestraining order seizures in necessary situations, (4) the relation-back of the forfeiture to the time of the commission of the offense, (4) the substitution of untainted assets for those related to the crime. Evidence, otherwise inadmissible under the Federal Rules, may be received in the ex parte hearings for preindictment restraining orders to avoid dilution of illegally obtained assets. The Supplemental Rules for Certain Admiralty and Maritime Claims are applied to civil forfeiture cases. Lastly, the Tariff Act of 1930, relating to the prohibition on immoral articles (19 U.S.C. § 1305), is amended to allow delay of forfeiture in order to permit the continuance of a criminal investigation. Current law requires immediate seizure of obscene matter upon its appearance at any Customs office, forcing Customs officials to seize the matter and, thereby, forgo investigation that could lead to a prosecution.

Forfeiture provisions were the number one legislative recommendation of the Attorney General's Commission on Pornography. See AGCP Final Report, Vol. I, p. 433 (attached as Exhibit I). They are viewed by prosecutors as the only realistic way to ensure compliance with federal law. Everything short of forfeiture provisions in the law, while helpful and expressive of Congress' intent on the regulation of obscenity, is, nonetheless, accepted by the billion dollar pornography industry as an easily affordable cost of doing business. Forfeiture is designed to take the ample economic incentive out of the business of flouting valid federal law.

In early years, criminal forfeiture was not utilized by the federal government. See 18 U.S.C. § 3563. Civil forfeiture has been available since the country was founded, initially emanating from the admiralty law. See The Palmyra, 12 Wheat 1 (1827). Beginning in the late 1960's, Congress began enacting criminal forfeiture provisions to some federal laws in order to effectively combat organized crime. See, e.g., 21 U.S.C. § 881 (1970)(drug trafficking); 21 U.S.C. § 847 (1970)(continuing criminal enterprise); 18 U.S.C. § 1963 (1970)(R.I.C.O.); 18 U.S.C. § 924 (1968)(illegal firearms); 18 U.S.C. § 1955 (1970) (illegal gambling). All of the foregoing provisions have withstood constitutional challenge. See, e.g., United States v. Long, 654 F.2d 911 (3rd Cir. 1981); United States v. Veon, 538 F.Supp. 237 (E.D. Cal. 1982). The rational behind criminal forfeiture provisions is to seize contraband and any assets that are traceable to it. Distinguished from civil forfeiture, which is remedial in nature, criminal forfeiture is punitive in nature and has as its aim the dismantling of the criminal enterprise and deterrence of future criminal activity. It is only civil forfeiture, with its different procedure and lower standard of proof, that poses any constitutional problems if the civil forfeiture is used as punishment. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (Court upholds use of civil forfeiture when not used as punishment even after acquittal on criminal charges).

Because obscenity is not within the scope of protection of the First Amendment, Congress may declare obscenity contraband and outlaw trafficking in it. United States v. Thirty-seven Photographs, 402 U.S. 363, 376-77 (1971). It is true that,

"...the standard of review is determined by the nature of the right threatened or violated rather than by the power being exercised or the specific limitation imposed." Shad v. Borough of Mount Ephraim, 452 U.S. 61 at 68 (1981). But what is reviewed, in these cases under First Amendment analysis, is the underlying legislation itself, not the subsequent penalties. The underlying statutes involved in this legislation are the federal proscriptions against obscenity and sexual exploitation of children, both of which have been upheld. See, e.g., Smith v. United States, 431 U.S. 291 (1977)(federal obscenity law upheld); United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987)(federal child pornography law upheld). In fact, critics of this legislation make no First Amendment challenge to the federal obscenity and child pornography statutes, themselves, but only to the subsequent penalties now being proposed. The only challenges that have been made raise issues of vagueness and prior restraint, both challenges that have been dismissed in cases where they have been raised. See United States v. Pryba, 674 F.Supp. 1504 (E.D. Va. 1987); Western Business Systems, Inc. v. Slaton, 492 F.Supp 513 (N.D. Ga. 1980); 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987), cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana, 56 U.S.L.W. 3608 (U.S. Mar. 8, 1988)(No. 87-470); State v. Feld, 745 P.2d 146 (Ariz. App. 1987)(court upheld criminal forfeiture, struck civil forfeiture).

What is claimed against the forfeiture provisions is that they will have a "chilling effect." Two things should be noted,

(1) not all "chilling effects" are unconstitutional and (2) a deterrence against violation of federal law resulting from these provisions is both constitutional and the intended effect of the provisions.

The three-part test for obscenity found in Miller v. California, 413 U.S. 15, 24 (1973), is not unconstitutionally vague. The federal statutes based on Miller, 18 U.S.C. § 1461 et. seq., frame offenses in language that "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices...gives adequate warning of the conduct proscribed and marks the 'boundaries sufficiently distinct for judges and juries fairly to administer the law.'" Roth v. United States, 354 U.S. 476, 491-2 (1957)(quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). Absolute precision is not constitutionally required, nor, of course, is it practical. Roth, 354 U.S. at 491-2. This legislation is drafted to effectively enforce federal law against multi-million dollar criminal enterprises trafficking in obscenity and child pornography. Claims that average bookstores which stock Penthouse magazine need fear federal prosecution are, at least, hysterical, if not absurd.

The claim of "prior restraint" is equally unfounded. "Prior restraint" is defined as "the imposition of a restraint on a publication before it is published." Black's Law Dictionary 1074 (5th ed. 1979). But there is a difference between prior restraint and subsequent punishment. An impermissible prior restraint is unconstitutional because it suppresses speech before its status is judicially determined. But even then, not all prior restraints are unconstitutional. See Near v. Minnesota, 283 U.S. 697 (1931)(publication of troop movements in wartime can be restrained); Freedman v. Maryland, 380 U.S. 51 (1965)(movie censor board's judgment which allows for immediate court review can be permissible). However, subsequent punishment presents none of the evils of prior restraint if it provides the procedural safeguard of a judicial determination of the alleged illegality. The federal obscenity and child pornography statutes contain these safeguards. A person prosecuted under these statutes may not only litigate the material's legal status, but may also challenge the facial and as applied constitutionality of the statute. Thus the subsequent punishment imposed by the forfeiture provisions is clearly not an impermissible prior restraint. "They are applied only after the due process of a criminal trial and whatever chilling effect they may have is legitimate and intended." Pryba, 674 F.Supp. at 1513 (upholding and applying federal R.I.C.O. forfeiture provisions).

### G. Section 203. Cable television obscenity.

This section would prohibit the transmission of obscene matter by cable or subscription television. It establishes that any transmission of obscene cable or subscription programming is sufficiently connected with interstate and foreign commerce to justify federal regulation. Section 203 specifically does not preempt states and local communities from enacting more stringent regulations of obscene or indecent cablecasts and subscription services.

Section 203 would remove any questions regarding whether obscene cablecasts can be prohibited by current law. Many attorneys argue that it is uncertain whether the provisions of 18 U.S.C. §§ 1462, 1464 and 1465 apply to obscene cablecasts. The Cable Communications Policy Act of 1984 (P.L. 98-549), while prohibiting the transmission of obscene matter over a cable system, 47 U.S.C. § 559, also prevents the federal government from regulating the content of cablecasts, 47 U.S.C. § 544 (f)(1). Although legally consistent, this amendment would resolve the apparent ambiguity and allow the federal government to assist states in preventing the pornography syndicate from using cable systems to transmit hard-core obscene films.

The Congressional findings preceding Section 203 provide justification for federal regulation of interstate and intrastate transmission of obscene cablecasts. With regard to intrastate cablecasts, Congress notes that cable programming is routinely transmitted between state lines, equipment necessary to provide cable and subscription television crosses state lines, and that a national market exists for cable programming. Even production and distribution of programming within one state has an impact on the national market, and thus justifies federal assistance to state efforts at fighting obscene cable transmissions. Congressional power to regulate intrastate activities which have a substantial effect on interstate commerce is well established. See, e.g., Perez v. United

States, 402 U.S. 146 (1971)(intrastate loansharking which substantially effected interstate and foreign commerce justified prosecution of purely intrastate extortion).

This legislation was recommendation number 5 of the Attorney General's Commission on Pornography. See AGCP Final Report, Vol. I, p. 434 (attached as Exhibit J).

H. Section 204. Communications Act amendment.

This section would amend the Communications Act of 1934, 47 U.S.C. 223 to prohibit only "obscene" dial-a-porn. Because Congress recently enacted the "Telephone Decency Act of 1988," which prohibits "obscene" and "indecent" message services, this section is unnecessary and should be deleted. If the "Helms-Bliley" Amendment is strictly enforced, hard-core dial-a-porn would disappear and no other laws are needed.

I. Section 205. Possession and sale of obscene matter on federal property.

This section would create two new offenses relating to obscenity and child pornography on federal property. The first offense would make it a felony to sell, or possess with the intent to sell, obscenity or child pornography on federal lands or property. The second offense would make it a misdemeanor to possess obscenity or child pornography on federal property, except that the offense for possession shall not apply to any person who possesses obscenity in any place where that person lives or resides.

The offenses described in this section already apply on federal property under applicable state law via the Assimilative Crimes Act, 18 U.S.C. § 13. This section would create a federal offense for possession and sale on federal property in states with no obscenity laws or would create a concurrent federal offense in states that do have obscenity laws. The legislative authority to enact this law could be derived from the Commerce Clause, art. I, § 8, cl. 3 or art I § 8, cl. 17, respecting authority over places purchased or ceded. At any rate, the only possible constitutional challenge to this section would be the proscription against possession of obscenity on federal property outside the possessor's residence.

Mere possession of child pornography, even when the material is located in the possessor's own home, may be proscribed consistent with the First Amendment. See State v. Meadows, 503 N.E.2d 697 (Ohio 1986), cert. denied, 480 U.S. ___, 107 S. Ct. 1581, 94 L.Ed.2d 771. Proscription against mere possession of obscenity or, at least, against mere possession in the possessor's home was found to violate the First Amendment in Stanley v. Georgia, 394 U.S. 557 (1969). Although Stanley struck down the state statute on somewhat attenuated First Amendment arguments, the Court buttressed these arguments with others based on privacy and possible Fourth Amendment rights against unreasonable searches and seizures. Id. at 565. Stanley has since been confined, as a matter of First Amendment law, strictly to its facts. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973)("The protection afforded by Stanley v. Georgia,...is restricted to a place, the home."). The Paris Court referred to Stanley's "narrow basis" of decision, that is, the "privacy of the home," calling the decision "hardly more than a reaffirmation that 'a man's home is his castle.'" Id. at 66. The Court, "declined to equate the privacy of the home relied on in Stanley with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." Id. (emphasis added).

Therefore, the exception that exists in this legislation for any place where a person lives or resides is necessary to this section's constitutionality. Furthermore, possessors of obscenity, like possessors of illegal narcotics, as well as all law-abiding citizens, are protected from unreasonable searches or other intrusions by the constitutional provisions of the Fourth Amendment and rights of privacy.

J. Section 206. Electronic surveillance.

This section would add the obscenity offenses (except that relating to mere possession) to the list of crimes for which the government may seek a court order authorizing electronic surveillance. The surveillance is limited to interception of wire and electronic communications as is provided for in investigations of other serious and organized crime related offenses under 18 U.S.C. § 2516.

The type of electronic surveillance authorized and the procedures for obtaining it under 18 U.S.C. § 2516 have been upheld in the Supreme Court. See generally United States v. United States Dist. Court for Eastern Dist., 407 U.S. 297 (1972). It is important to note that constant judicial review and strict guidelines already in place will govern application for and utilization of wire interceptions. One requirement for approval is a factual showing that ordinary investigative techniques have been unsuccessful. Congress has already equated large-scale trafficking in obscenity with crimes requiring extraordinary law enforcement measures. See 18 U.S.C. 1961 (R.I.C.O.). The addition of this, often indispensable, law enforcement tool would be consistent with that determination, especially for utilization when ordinary investigative techniques have failed.

## III. CONCLUSION.

We trust that the members of Congress have already been convinced by the ample policy arguments made by the Justice Department and by the many concerned citizens who have testified of the magnitude of the problems associated with the traffic in illegal obscene materials. The recommendations now before Congress would provide the federal government the law enforcement tools which are needed to deal with those problems that require federal attention. As this memorandum has demonstrated, all of this legislation is consistent with the rights and protections afforded by the United States Constitution.

Respectfully submitted,

ALAN E. SEARS
Legal Counsel
Citizens for Decency through Law, Inc.

# EXHIBIT A

## STATEMENT OF PARK ELLIOTT DIETZ, M.D., M.P.H., PH.D.

Aristotle has taught us for years that a society must concern itself with virtue. "Otherwise . . . law becomes a mere contract or mutual guarantee of rights, and quite unable to make citizens good and just, which it ought to do. . . ." It is this "good and just" society which America has enjoyed from its beginning. It became so because its people had a shared respect, a unifying vision, a common understanding of man's place in the world. We have a phenomenon today, in the pervasive presence of sexually explicit materials, that challenges one of those understandings held by society for thousands of years—that sex is private, to be cherished within the context of love, commitment, and fidelity. We can use this wondrous gift to create or destroy, to rule or be ruled, to honor each other or debase each other. This Report provides an abundance of information, and the conclusions of a community of eleven citizens. The American people must now decide what to do with it.

# STATEMENT OF PARK ELLIOTT DIETZ, M.D., M.P.H., PH.D.[1]

In recent decades there has been a desirable trend toward using empirical evidence to test long-held assumptions underlying legal doctrine and procedure and to rely on social science evidence to make better-informed judgments about difficult questions of law and social policy. Social science has given good service in answering questions about adequate jury size, in determining public perceptions of trademark products, in profiling skyjackers, in sentencing convicted criminals, and in limiting the exclusionary rule. But social science is too new on the historical scene to have developed adequate data on every important social problem, too little funded to have amassed all the data desired, and too positivistic to tell us what we should do, particularly when competing interests are at stake.

The 1970 Commission on Obscenity and Pornography went so far in attempting to rely on social science evidence that a majority of its members took the absence of experimental evidence of causation of antisocial behavior or sexual deviance as a basis for urging the deregulation of obscenity. The present Commission did not limit its inquiry to the products of social science research. While in this respect we depart from the tradition of one predecessor Commission, we do not depart from the tradition of those who have been charged with formulating social policy for the whole of human history. Every time an emperor or a king or a queen or a president or a parliament or a congress or a legislature or a court has made a judgment affecting social policy, this judgment has been made in the absence of absolute guidance from the social sciences. The Constitutional Convention of 1787 had no experimental evidence to guide its decision making. When the First Congress proposed the First Amendment in 1789 and when it was ratified by the states in 1791 and made a part of the Constitution, the empirical social sciences had not yet been conceived.

As in public policy, decision makers in medicine must exercise their best judgment in the face of uncertainty, being guided by science as far as it takes us, being guided by a commitment to the well being of individuals and of society, and being guided by sensitivity toward those situations in which the best interests of an individual conflict with the best interests of society. It is within this framework that I have tried to make my own best judgments about pornography while serving on the Commission. At every step in our joint decision making, the medical and public health consequences have been in the forefront of my concerns. These consequences are not widely recognized, for which reason I devote most of my personal statement to an overview of these.

Before the Commissioners had even met one another, the press had begun to suggest bias among the Commissioners and to wave red flags of censorship. Now, before our report has even gone to the printer, there have already been claims that we are too liberal, that we are too conservative, that we have gone too far, that we have not gone far enough, that we have ignored evidence showing how innocuous pornography is, and that we have ignored evidence showing how destructive pornography is. In short, there are those who have rejected our findings before the report has even been issued, and I have no doubt many more will do so in the future without having read it. Likewise, but for somewhat different reasons, there will be those who accept our findings without having read our report. This is equally risky. Our report is meant to be read, and I encourage every adult in America to do so before accepting or rejecting our findings.

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[1] Commissioner Cusack concurs in this statement.

The reader should be forewarned, however, that our report contains offensive materials. Some readers will be offended by quoted language, particularly the titles of magazines, books, and films that we considered. But the offensiveness of some of the quoted language is nothing when compared to the suffering described by victims whose accounts are quoted in the victimization chapter. This is not bedtime reading. As with the practice of medicine, one must sometimes cause discomfort to effect a cure, and it was our judgment that the public and the truth would be best served by including certain discomforting materials in the report.

I came to the Commission with personal views on pornography which were based on intellectual and humanitarian concerns and on certain noncontroversial ethical principles; the morality of pornography was the farthest thing from my mind. Thus, I was astonished to find that by the final meeting of the Commission, pornography had become a matter of moral concern to me. While other Commissioners may have learned things about the dark side of life that they had never known, I remembered something about the higher purposes of life and of humanity's aspirations that I had forgotten during too many years working on the dark side. I therefore conclude my remarks with statements on morality and on freedom that would have seemed foreign to me not many months ago.

### Pornography And Health

**Abuse of Persons Used in Production.** Pornography is a medical and public health problem because people, particularly women and children, are abused in the production of certain pornographic materials. People have been beaten, forced to engage in sexual acts, held prisoner, bound and gagged, and tortured for purposes of producing pornography. In the course of these events they have been exposed to the risk of acquiring sexually transmitted diseases. Some have been supplied with narcotics. Of course, these crimes could have been prosecuted in their own right, even if there were no obscenity or child pornography laws. Moreover, the market for pornography is, after all, but one of several motives for the commission of these crimes, all of which also occurred before the invention of photography. If these were the only adverse health consequences of pornography, the most straightforward remedy would be regulation of the pornography industry to assure safe and fair labor practices. But these are not the only adverse health consequences of pornography.

**Injurious Products.** Pornography is a medical and public health problem because pornographic retail outlets of the "adults only" variety sell products under the pretext of health and recreation that are the instruments of injury, both intentional and unintentional. People have suffocated in bondage hoods. People have asphyxiated and burned to death in handcuffs and bondage restraints. People have been raped and lacerated with dildos. People have had "sexual aid" devices entrapped in body cavities, requiring extraction at hospital emergency wards. People have died from orally ingesting volatile nitrites and have suffered cerebrovascular injury from inhaling these same chemicals, sold as aphrodisiacs under various pretext labels in these establishments. People have been abducted and have been conned into exiting their vehicles or allowing strangers into their homes when offenders have shown them phony police badges, sold as "novelties" in some of these establishments. People have been robbed and put in fear of their life by offenders who have wielded phony guns, also sold as "novelties" in some of these establishments. If these were the only adverse health consequences of pornography, the most straightforward remedies would be public education, regulation of some of these products through food and drug law and others through criminal sanctions, and tort actions by the injured against producers and distributors of inherently dangerous products and products that were negligently designed.

marketed, labeled and sold. But these are not the only adverse health consequences of pornography.

**Vice Centers.** Pornography is a medical and public health problem because pornographic retail outlets of the "adults only" variety are the most visible service stations of the vice industry. The peep-show booths, with their locking doors, are the self-service pumps, as evidenced by the body fluids on their floors and walls. The openings in the walls of the booths allow anonymous and casual sexual contact, making it impossible to trace the donors and recipients of sexually transmitted diseases. These establishments draw muggers to a pool of victims who are somewhat disinclined to report a robbery to the police. These establishments signal members of the community and visitors that full vice services may be available nearby through prostitutes and drug dealers and, if not so directly available, are a phone call away through the advertisements found in tabloids, periodicals, and sex-for-sale guides. If these were the only adverse health consequences of pornography, the most straightforward remedy would be to prohibit retail sales except through the mail. But these are not the only adverse health consequences of pornography.

**Sexual Disinformation.** Pornography is a medical and public health problem because so much of it teaches false, misleading, and even dangerous information about human sexuality. A person who learned about human sexuality in the "adults only" pornography outlets of America would be a person who had never conceived of a man and woman marrying or even falling in love before having intercourse, who had never conceived of two people making love in privacy without guilt or fear of discovery, who had never conceived of tender foreplay, who had never conceived of vaginal intercourse with ejaculation during intromission, and who had never conceived of procreation as a purpose of sexual union. Instead, such a person would be one who had learned that sex at home meant sex with one's children, stepchildren, parents, stepparents, siblings, cousins, nephews, nieces, aunts, uncles, and pets, and with neighbors, milkmen, plumbers, salesmen, burglars, and peepers, who had learned that people take off their clothes and have sex within the first five minutes of meeting one another, who had learned to misjudge the percentage of women who prepare for sex by shaving their pubic hair, having their breasts, buttocks, or legs tattooed, having their nipples or labia pierced, or donning leather, latex, rubber, or child-like costumes, who had learned to misjudge the proportion of men who prepare for sex by having their genitals or nipples pierced, wearing women's clothing, or growing breasts, who had learned that about one out of every five sexual encounters involves spanking, whipping, fighting, wrestling, tying, chaining, gagging, or torture, who had learned that more than one in ten sexual acts involves a party of more than two, who had learned that the purpose of ejaculation is that of soiling the mouths, faces, breasts, abdomens, backs, and food at which it is always aimed, who had learned that body cavities were designed for the insertion of foreign objects, who had learned that the anus was a genital to be licked and penetrated, who had learned that urine and excrement are erotic materials, who had learned that the instruments of sex are chemicals, handcuffs, gags, hoods, restraints, harnesses, police badges, knives, guns, whips, paddles, toilets, diapers, enema bags, inflatable rubber women, and disembodied vaginas, breasts, and penises, and who had learned that except with the children, where secrecy was required, photographers and cameras were supposed to be present to capture the action so that it could be spread abroad. If these were the only adverse health consequences of pornography, the most straightforward remedy would be to provide factually accurate information on human sexuality to people before they are exposed to pornography, if only we could agree on what that information is, on who should provide it to the many children whose parents are incapable of doing so, and on effective and acceptable means by which to ensure that exposure not precede education. In the absence of such a remedy, the probable health consequences in this area alone are sufficient to support recommendations that would reduce the dissemination of that pornography which teaches false, misleading, or dangerous information about human sexuality. And these are not the only adverse health consequences of pornography.

**Encouraging Social Behavior with Adverse Health Consequences.** Pornography is a medical and public health problem because it encourages patterns of social behavior which have adverse health consequences. The person who follows the patterns of social behavior promoted by pornography is a person for whom love, affection, marriage, procreation, and responsibility are absolutely irrelevant to sexual conduct. We do not need research to tell us that such persons on the average contribute more than other persons to rates of illegitimacy, teenage pregnancy, abortion, and sexually transmitted diseases. If these were the only adverse health consequences of pornography, the most straightforward remedy would be to more effectively encourage responsible sexual behavior, if only we knew how. In the absence of such a remedy, the probable health consequences in this area alone are sufficient to support recommendations that would reduce the dissemination of pornography. And these are not the only adverse health consequences of pornography.

**Fostering Attitudes with Adverse Health Consequences.** Pornography is a medical and public health problem because it increases the probability that members of the exposed population will acquire attitudes that are detrimental to the physical and mental health of both those exposed and those around them. The social science evidence adequately demonstrates that even in experimental samples of mentally stable male college students, exposure to violent pornography leads to measurable, negative changes in the content of sexual fantasies, attitudes toward women, attitudes toward rape, and aggressive behavior within the experimental setting. Analogous results of exposure to nonsexual media violence have been well-documented for even longer. Although too few experiments have clearly tested the effects of degrading pornography, there are suggestions in the few existing studies that exposure to degrading pornography has negative effects in the experimental setting, including eliciting anxiety, depression, and hostility. Biographical accounts of individuals go beyond the experimental evidence in attributing changes in male sexual attitudes and demands to pornography, including nonviolent pornography, and in documenting adverse consequences to women and children of the behavior of these men. Some of these accounts include persuasive examples of direct and immediate imitation and of long-term modeling effects. Moreover, the existing population-based evidence for the United States shows a correlation between circulation rates of magazines containing pornography (primarily of a nonviolent type) and rates of reported rape in the fifty states during the same time period, even after many other factors were statistically controlled. In my opinion, we know enough now to be confident in asserting that a population exposed to violent pornography is a population that commits more acts of sexual brutality than it otherwise would and to suggest somewhat less confidently that the same is probably true of a population exposed to degrading pornography. Even if these were the only adverse health consequences of pornography, there would be no straightforward remedies for these consequences short of reducing the exposure of the population to violent and degrading pornography. And these are not the only adverse health consequences of pornography.

**Instruments of Sexual Abuse.** Pornography is a medical and public health problem because it is used as an instrument of sexual abuse and sexual harassment. Pornography of all types is used in the sexual abuse of children to instruct them on particular sexual acts and to overcome their resistance by showing them what adults do and by intimidating them about the painful things that might be done to them if they fail to comply. Pornography of all types is used to instruct women in the sexual behaviors that men desire of them but which they have "failed" to provide, forcing women who have or see no other options to choose between the feelings of inadequacy that accompany refusal and the feelings of self-loathing that accompany compliance. Pornography of all types is used to harass women in the workplace and to remind them into whose world they are intruding, leading to feelings of shame, disgust, and powerlessness. Even if these were the only adverse health consequences of pornography, there would be no straightforward remedies for these consequences short of reducing the quantity of pornography in circulation. And these are not the only adverse health consequences of pornography.

**Presumed Corruption of Children.** Pornography is a medical and public health problem because it falls into the hands of children, who must be assumed vulnerable to adverse mental health consequences unless and until proved otherwise. Although experiments to test this assumption pose potentially insurmountable ethical dilemmas, it should be possible to design studies to examine the responses of children who have been exposed to pornography in other ways, such as negligent parental storage. Such studies would require safeguards to protect the child against any further harm and a suitable control group, such as children whose parents possess pornography to which the children were not exposed. To date, the effects of exposure on young children are unknown, but it would be as imprudent to assume no negative health consequences of pornography as it would to make such an assumption about a drug that had not been properly tested. Even if the assumed harms to exposed children were the only adverse health consequences of pornography, there would be no straightforward prevention or remedy for these consequences short of reducing the quantity of pornography in circulation. And these are not the only adverse health consequences of pornography.

**The Limits of Obscenity and Child Pornography Laws in Reducing the Adverse Health Consequences of Pornography.** The adverse health consequences of pornography are not limited to a single class of pornographic materials, though the various classes have differing health consequences. Most importantly perhaps, the adverse health consequences of pornography are not limited to materials that are legally obscene or that violate child pornography law. Thus, existing laws, even if enhanced and enforced as recommended in this report, are insufficient to prevent the adverse health consequences attributable to pornography. Obscenity law is designed to suppress the offensive, but on medical and public health grounds it would be more desirable to suppress the harmful. To the extent that the obscene and the harmful overlap, obscenity law is a powerful tool of health promotion. But if the adverse health consequences of pornography are to be minimized, strategies other than effective enforcement of obscenity law and child pornography law will be necessary. In addition to the strategies that increase the effectiveness and enforcement of existing law, the nation's health requires a creative search for countermeasures against the adverse health consequences of non-obscene, non-child pornography, which will inevitably survive law enforcement efforts directed against obscenity and against child pornography. In this search, we must inevitably come to terms with the need for appropriate sex education.

The Commission report endorses citizen actions that could help reduce the adverse health consequences of non-obscene, non-child pornography, but the report is necessarily unclear on the nature and extent of this class of materials. This lack of clarity carries with it the risk that citizen action will be misdirected. To the extent that citizens care to base their actions against non-obscene material on its medical and public health consequences, they will do more to promote health if they insure that their efforts encompass violent and degrading images, especially sexually violent and degrading images. Unhealthy as some nonobscene pornography may be, it is not as unhealthy as detective magazine covers depicting violence toward a woman whose sexual characteristics are emphasized, horror films depicting girls or women undressing moments before the villain pounces upon them, or televised depictions of violence toward alluring, glamorous, and wanton women. Like rape itself, violent pornography is not so much about sex as about violence. It is no distortion of the language to refer to violence that is not sexually explicit as pornography. The word "pornography" derives from the Greek for the writings of prostitutes, and the life of the prostitute is as much a life of violence as it is a life of sex. If sexually stimulating materials that are nonviolent, nondegrading, and nonobscene have beneficial health consequences, the most important among them must be that they distract attention from materials that are violent and degrading.

**Pornography And Morality**[2]

Acting as a whole, the Commission attempted to provide a reasoned analysis of the permissible and desirable relationships between government and the regulation of sexually explicit materials, including the rights of citizens to take private action. As a governmental body, we studiously avoided making judgments on behalf of the government about the morality of particular sexual acts between consenting adults or their depiction in pornography. This avoidance, however, should not be mistaken for the absence of moral sentiment among the Commissioners.

I, for one, have no hesitation in condemning nearly every specimen of pornography that we have examined in the course of our deliberations as tasteless, offensive, lewd, and indecent. According to my values, these materials are themselves immoral, and to the extent that they encourage immoral behavior they exert a corrupting influence on the family and on the moral fabric of society.

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[2] Chairman Hudson, Commissioners Dobson, Lezar, Garcia and Cusack concur in this section

Pornography is both causal and symptomatic of immorality and corruption. A world in which pornography were neither desired nor produced would be a better world, but it is not within the power of government or even of a majority of citizens to create such a world. Pornography is but one of the many causes of immorality and but one of its manifestations. Nonetheless, a great deal of contemporary pornography constitutes an offense against human dignity and decency that should be shunned by the citizens, not because the evils of the world will thereby be eliminated, but because conscience demands it.

### Pornography And Freedom

When Andrea Dworkin challenged us to find the courage "to go and cut that woman down and untie her hands and take the gag out of her mouth, and to do something, to risk something, for her freedom," I cried. And I still cry at that image, even as I write, because if we do not act with compassion and conviction and courage for the hostages and victims of the pornographers we do not deserve the freedoms that our founding fathers bequeathed us. It has been nearly two centuries since Phillipe Pinel struck the chains from the mentally ill and more than a century since Abraham Lincoln struck the chains from America's black slaves. With this statement I ask you, America, to strike the chains from America's women and children, to free them from the bonds of pornography, to free them from the bonds of sexual slavery, to free them from the bonds of sexual abuse, to free them from the bonds of inner torment that entrap the second-class citizen in an otherwise free nation.

### Appendix

To elucidate one example of the types of material that are probably not obscene under the Miller test but which should be high on any list of media depictions posing risks to health, I append an article that I coauthored, with appreciation to the *Journal of Forensic Sciences* in which it was published and the American Society for Testing and Materials which holds the copyright for permission to include it here.

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*Park Elliott Dietz, M.D., M.P.H., Ph.D.; Bruce Harry, M.D.; and Robert R. Hazelwood, M.S*

## Detective Magazines: Pornography for the Sexual Sadist?

**REFERENCE:** Dietz, P. E., Harry, B., Hazelwood, R. R., "Detective Magazines: Pornography for the Sexual Sadist" *Journal of Forensic Sciences*, JFSCA, Vol. 13, No. 1, Jan. 1986, pp. 197–211.

**ABSTRACT:** The origins of detective magazines can be traced to 17th and 18th century crime pamphlets and to 19th century periodicals that Lombroso called "really criminal newspapers." Content analysis of current detective magazines shows that their covers juxtapose erotic images with images of violence, bondage, and domination; that their articles provide lurid descriptions of murder, rape, and torture; and that they publish advertisements for weapons, burglary and car theft tools, false identification, and sexual aids. Six case histories of sexual sadists illustrate the use of these magazines as a source of fantasy material. We postulate that detective magazines may contribute to the development of sexual sadism, facilitate sadistic fantasies, and serve as training manuals and equipment catalogs for criminals. We recommend that detective magazines be considered during policy debates about media violence and pornography.

**KEYWORDS:** psychiatry, criminal sex offenses, deviant sexual behavior, detective magazines, sexual sadism, pornography, criminal behavior, sexual homicide.

A class of popular periodicals known as "detective magazines" has apparently eluded the attention of researchers and commentators concerned with media violence and pornography. These magazines

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# EXHIBIT B

# RESEARCH FINDINGS AND ANALYSIS OF JAMES B. WEAVER, III, PH.D.

# EFFECTS OF PORTRAYALS OF FEMALE SEXUALITY AND VIOLENCE AGAINST WOMEN ON PERCEPTIONS OF WOMEN

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# Chapter Four

## Discussion

The findings show that brief exposure to explicitly sexual and violent media portrayals is capable of inducing substantial shifts in (a) general perceptual dispositions toward women and men and (b) attitudes toward punishment of a convicted rapist. More importantly, the data highlight the fact that exposure to sexually explicit and sexually violent media depictions can yield strikingly different perceptual and dispositional consequences. In general, the evidence suggests that sexually explicit themes most strongly influence perceptions associated with sexuality (e.g., permissiveness), whereas predominantly violent themes impact more general perceptions.

Specifically, the data show that exposure to nonviolent sexually explicit materials can adversely influence perceptions of the "sexual receptivity" of women without affecting other personality assessments. This effect was most pronounced for judgments of women who manifest characteristics typically associated with the subjects' peer group (e.g., age, attractiveness, etc.) and characteristics associated with sexual restrictiveness (e.g., sexually conservative and inexperienced). Independent of subject gender, exposure to the two experimental conditions involving nonviolent sexually explicit materials had essentially no influence on perceptions of the excessiveness or pleasantness of these women. However, the exposure treatments did produce shifts in perceptions of the permissiveness and assertiveness of the sexually nonpermissive female peers. And, as expected, significant gender differences were evident.

Compared with men who viewed the neutral materials, those exposed to either the consensual or female-instigated exposure condition attributed significantly greater permissiveness to the nonpermissive female peers. Those in the female-instigated condition also viewed the peer females as less assertive. This pattern of perceptual responses is quite consistent with evidence from several investigations (e.g., Zillmann, & Bryant, 1982, 1984, in press) and with the notion that

exposure to sexually explicit themes results in a general "loss-of-respect" for female sexual autonomy and self-determinism. Apparently, watching portrayals of intimate heterosexual behaviors made concepts associated with female sexual promiscuity and permissiveness particularly accessible for the male subjects. Then, in a separate context, these concepts adversely affected subsequent judgments of the peer-group females. In a recent essay, Diamond (1985) asked: "Does the male viewer reinterpret even positive images of women through oppressive conventions by, for example, assuming that any naked woman is available?" (p. 57). These findings suggest that this may be the case.

The perceptual responses of female subjects occasioned by exposure to the nonviolent sexually explicit themes were quite different. Specifically, the data show that female subjects exposed to the consensual sex materials attributed the lowest levels of permissiveness and assertiveness to the nonpermissive female peers. One explanation of these findings, suggested by Wyer, Bodenhausen, and Gorman (1985), is that they reflect a tendency for women to react defensively to public exhibitions of female sexual objectification. Because of traditional sex role socialization, it is argued, women recognize the adverse perceptual and behavioral consequences that sexually explicit media can produce (Griffitt, 1973) and, in response, attribute more positive characteristics to their peers. However, the fact that female subjects responded with some indifference to the more objectifying, female-instigated exposure materials requires further examination.

One speculation is that the female subjects, unlike their male counterparts, perceived distinct differences in the content of the consensual and female-instigated condition materials. For example, they may have regarded the significance of the depictions of women eagerly seeking sexual endeavors presented in the female-instigated materials as unrealistic--or at least inapplicable to perceptions of themselves or their peers--and, consequently, responded with indifference. On the other hand, the consensual materials could have been seen as more self-relevant and sexually exciting. If, as is often noted, "romantic love" is a critical component governing female sexual responsiveness (e.g., Carroll, Volk, & Hyde, 1985; Steinem, 1980), then exposure to the seemingly erotic, mutually pleasurable sexual themes depicted in the consensual sex condition could have led the female subjects to view sexuality more positively (Wishnoff, 1978). Under such circumstances, the attribution to peer-group females of lower levels of permissiveness and assertiveness could be an expression of the female subjects' own sexual interests. Unfortunately, the validation of these speculations is beyond the scope of this investigation.

Consistent with the notion of hedonic contrasting (Baron, 1979), the data reveal a general tendency for subjects to perceive others in a negative manner following exposure to explicitly violent or otherwise unpleasant media depictions. For both male and female subjects, watching either the male-coerced sex (i.e., acquaintance rape) or eroticized-violence (i.e., "slasher" film) materials produced subsequent perceptions of the nonpermissive female peers as less pleasant and innocent. However, this negative perceptual biasing did not readily generalize to perceptions associated with sexual permissiveness or submissiveness. Among male subjects, for example, the negative distorting effect projected by the target appropriateness perspective as resulting from exposure to either of the sexually violent conditions was not evident. In fact, male subjects who viewed the eroticized-violence materials reported enhanced perceptions of the assertiveness of the nonpermissive female peers.

Interestingly, a different pattern of effects was evident for female subjects. Like their male counterparts, women who viewed the eroticized-violence materials reported perceptions of the sexual permissiveness and submissiveness of the nonpermissive female peers that appeared unaffected by the exposure treatment. As expected, however, female subjects exposed to the rather realistic acquaintance rape depictions (i.e., male-coerced sex condition) judged these women to be significantly more permissive and assertive. This pattern of results is similar to those recently reported by Krafka (1985) and provides further evidence of media activated perceptual distancing consistent with the "just world" hypothesis (Lerner, Miller, & Holmes, 1976). According to

this notion, people are motivated to view the world as a controllable place where bad things happen only to bad people. Consequently, when observing the misfortunes of another, individuals are thought to blame the other's actions or character for bringing on the event. For female subjects, as has been suggested by others (Wyer, Bodenhausen, & Gorman, 1985), the male-coerced sex condition materials could have made accessible constructs associated with the derogation of the female victims that remained to adversely influence subsequent perceptions of the nonpermissive female peers.

The analyses of the generalized distance scores provided additional information about the impact of the exposure treatments on judgments of others. Significant perceptual profile shifts were evident for the nonpermissive female peers. Specifically, compared with the neutral exposure condition, all four experimental conditions shifted perceptions of these women toward those of the sexually promiscuous (PROM) exemplars. A similar, but weaker, shift toward the sexually-submissive (SEXSUB) exemplar was also evident. Interestingly, an equally strong shift toward the counter-promiscuous (CPROM) exemplars was evident for male subjects' perceptions of the nonpermissive nonpeer females. Perceived sexual permissiveness was a distinguishing characteristic of all three of these exemplars suggesting that the sexual content of the exposure materials activated constructs within this dimension. Exposure to the male-coerced and eroticized-violence conditions also shifted perceptions of the nonpermissive female peers toward those of the extremely assertive counter-submissive (CSUB) exemplars. This effect was particularly strong for male subjects who viewed the eroticized-violence materials. A similar shift was also evident for perceptions of the nonpermissive nonpeer females. Additionally, such exposure shifted perceptions of permissive nonpeer females toward those of the counter-promiscuous exemplars. These findings suggest that constructs associated with female assertiveness, rather than female submissiveness, were made more accessible by exposure to the sexually violent materials. Additionally, exposure to portrayals of women taking the initiative in sexual encounters (female-instigated condition) shifted perceptions of the males toward that of the counter-promiscuous male exemplar.

Finally, the findings reveal that exposure to depictions of women eagerly and indiscriminately seeking and participating in sexual endeavors influenced punitive judgments against a convicted rapist most strongly. Subjects exposed to the female-instigated materials, compared to those in the other conditions, recommended significantly shorter periods of incarceration. This effect was equal for both men and women. Additionally, subjects who viewed the male coerced sex and eroticized violence conditions, compared to those in the neutral condition, also recommended less punishment for rape. Exposure to the consensual sex exposure materials did not significantly impact punitive judgments, however. More importantly, the results of a regression analysis illustrate that, although exposure to both sexually explicit and violent portrayals may produce similar judgments of the rapist, these assessments are best predicted by consumption of the female-instigated materials and perceptions of both men and women as permissive and excessive. Counter to the projections of the target appropriateness perspective, the perceived submissiveness of women did not influence these judgments appreciably. It must be recognized, however, that the rather small amount of variance explained by the model highlights the complexity associated with dependent measures that involve the confounding of sexual *and* violent behavior.

Taken together, these data indicate that the dispositional and perceptual consequences of viewing sexually explicit media depictions are much more extensive than proposed by some (cf. Donnerstein & Linz, 1986, December; Linz, 1985; Steinem, 1980). Clearly, these findings are inconsistent with the assertion that no ill effects result from exposure to depictions of noncoercive, "erotic" sexual activities (Donnerstein, 1984b). Furthermore, these findings show that exposure to media depictions which, by design, are intended to arouse, frighten, and disgust can activate cognitions that enhance the perception of the negative characteristics of others. The data also suggest, however, that the ability of such media depictions to activate cognitions

associated with the degradation or subjugation of women is far less pronounced than earlier theorized (Donnerstein & Linz, 1986, December; Linz, 1985). It could be argued, of course, that the type of materials used and the duration of the exposure treatment in this study were insufficient to permit the "aggressive cue value" of the nonpermissive female peers to be conditioned or modeled and, consequently, did not provide a fair test of the target appropriateness considerations. Such a claim, however, does not appear justified. Compared with the stimuli utilized by Donnerstein and Berkowitz (1981), for example, the exposure treatments of this study were over twice as long and, in the case of the male-coerced sex and eroticized-violence conditions, involved at least as much violence. The sexual content of the stimuli did differ, however. Specifically, the materials used in this investigation appear to have involved substantially *less* sexual content than the "aggressive-pornography" employed by Donnerstein and Berkowitz to operationalize a "rape-myth" depiction. Despite the claim that "it is the violence, whether or not accompanied by sex, that has the most damaging effect" (Donnerstein & Linz, 1986, December, p. 59), the findings of the present investigation clearly indicate that the consequences of exposure to sexually explicit materials that are devoid of violent content are in need of further consideration.

In sum, the findings of this investigation strongly suggest that the theoretical formulation that views the adverse impact of media messages on perceptions of women as resulting from the modeling of violent behaviors is not as applicable as some have assumed (i.e., Donnerstein & Linz, 1986, December). Indeed, the projections of the target appropriateness perspective appear much too restrictive to explain the complex pattern of effects of this investigation. Instead, the data lend considerable support to a perspective based on social cognition considerations. This perspective recognizes that exposure to both sexually explicit and/or violent materials can activate cognitive constructs that mediate subsequent perceptions, dispositions, and behaviors. Specifically, this investigation revealed considerable perceptual and dispositional effects that remained up to one-half hour after the brief exposure-treatment. The persistence of these effects over time and their resistance to competing stimuli remains to be determined, however.

Based on the findings of this investigation, two lines of inquiry for future research appear of particular interest. Future research might examine whether the adverse perceptual consequences occasioned by exposure to sexually explicit materials generalize to produce behavioral effects in intergender social interactions. For example, the fact that men often misperceive the otherwise friendly behaviors of women as seductive has been established (Abbey, 1982; Goodchilds & Zellman, 1984). Does prior exposure to sexually explicit materials exaggerate this tendency and, if so, with what effects? Additionally, future research should explore the impact of prior exposure to sexually explicit and violent materials on perceptions of female victims of nonviolent misfortunes. Many critics have suggested that the most damaging effects of such materials are evident in the ill treatment of women, simply because of their gender, in everyday circumstances (e.g., sexual harassment, employment discrimination, and economic exploitation). Do cognitive constructs associated with female permissiveness, once made accessible by exposure to sexually explicit materials, generalize to influence perceptions outside the direct realm of human sexuality? Given the seemingly ubiquitous nature of both sexually explicit and violent materials in our society, additional research examining the impact of exposure to such depictions appears clearly justified.

# EXHIBIT C

## USE OF PERFORMERS IN PORNOGRAPHY--THE EVIDENCE

ers"[957]—in this case children. Filming children in the midst of explicit sexual activity not only harmed them because of the sexual abuse involved, but also because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[958] In addition, the continued existence of a market for such materials was found to make it more likely that children would be abused in the future thus justifying a ban on distribution as the "most expeditious if not the only practical method of law enforcement. . . ."[959]

Since *Ferber*, courts have begun to consider problems faced by performers in pornography, including adults as well as children. The Fifth Circuit recently upheld a judgment against *Chic* magazine for publishing a nude picture of a woman whose consent had been obtained fraudulently.[960] The same court sustained a judgment against *Hustler* magazine for "reckless" publication of a nude photograph which had been stolen from the subject's home.[961] And in overturning the "Indianapolis Ordinance"—which sought to provide civil remedies against pornography as a form of sex discrimination—the Seventh Circuit declared that "without question a state may prohibit fraud, trickery, or the use of force to induce people to perform in pornographic or in any other films,"[962] and that under the principles of *Ferber* the state might be able to "restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct."[963]

In the wake of the *Ferber* decision, then, it is still difficult to predict the precise constitutional boundaries which govern regulation of photographic "speech" on behalf of performers.[964] That such performers have privacy and other interests worthy of protection, however, now seems clear. In part as a response to these judicial developments and in part as an effort to aid in future legal analysis, we feel compelled to examine with the utmost care the evidence bearing on the situation of performers used in pornographic photographs, video tapes, and films.

## USE OF PERFORMERS IN PORNOGRAPHY—THE EVIDENCE

Because no previous commission has fully examined the special problems presented by the use of actual persons to make sexually-explicit material, and because courts have only begun to develop the legal principles which may be applied to resolving those problems, we approach this aspect of our task with extreme caution. To begin with, we comment on the nature and the quality of the evidence before us both in testimony at our hearings and on the public record elsewhere. Then we examine the main outlines of what that evidence reveals about the nature of the performers' reasons for participation in producing pornography, and their experiences once the decision has been made.

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[957] *Id.*, p. 759 n. 10.

[958] *Id.*, p. 759. Circulation of the pornography was found by the Court to violate "the individual interest in avoiding disclosure of personal matters." *Id.*, p. 759 n. 10 (citing *Whalen v. Roe*, 429 U.S., (1977), p. 599).

[959] *Id.*, p. 760.

[960] *Braun v. Flynt*, 726 F. 2d, (1984), p. 245, cert. denied, 105 S. Ct., (1984), p. 783.

[961] *Wood v. Hustler Magazine, Inc.*, 736 F.2d, (1984), p. 1084, cert. denied, 105 S. Ct., (1985), p. 783. Accord, *Hustler Magazine, Inc. v. Douglass*, 769 F.2d, (7th Cir. 1985), p. 1128, cert. denied, 54 U.S.L.W., (Mar. 31, 1986), p. 3646.

[962] *American Booksellers Assn. v. Hudnut*, 771 F. 2d, (1985), pp. 323, 332, *aff'd mem.*, 54 U.S.L.W., (Feb. 24, 1986), p. 3560.

[963] *Id. But cf.*, *Faloona v. Hustler Magazine*, 607 F. Supp. (D.C. Tex. 1985), p. 1341, appeal docketed, No. 85-1390 (5th Cir. 1985) (children whose nude pictures, including one showing the plaintiff child holding her vagina open facing the camera, *Hustler*, (Nov. 1978), p. 33, appeared in adult magazine had no right to revoke mother's consent to publication).

[964] For an indication of the confusion still remaining compare *Braun v. Flynt*, *supra* note 960, with *Faloona v. Hustler Magazine*, *supra* note 963. Deference to the parent's "consent" to publication of the nude pictures in the *Faloona* case is difficult to justify in view of their graphic character. See, note 963 *supra*, which makes them at least arguably prohibited "child pornography" under state and federal law. *But see*, *Faloona*, *supra*, 607 F. Supp. p. 1343 n. 4 (denying that the pictures constitute child pornography despite inclusion in federal statute of prohibitions directed at "lewd exhibition of the genitals" of children 18 U.S.C. §2255(2) (D) (1984).

## THE NATURE OF THE EVIDENCE

In setting forth the types of evidence we have considered on this subject, it is important to note first the limitations which have been imposed on our fact-finding efforts. Above all, we have not had the power to issue subpoenas summoning reluctant witnesses to appear; thus all information at our disposal was presented to us voluntarily or obtained through our review of materials on the public record. In addition, the severe time constraints imposed on our work were particularly damaging in this area because, as discussed earlier, this aspect of the pornography "industry" has received only the scantiest attention in the past. We, therefore, did not have the benefit of knowing from the outset what were the most likely avenues to discovery of pertinent evidence about activities that are largely underground. Finally, both the difficulty of locating witnesses and the pressure of time meant that we were not able to spend substantial time in cross-examination of their testimony or in background investigations to corroborate their statements.

Caution is dictated, too, because there have been to our knowledge almost no "scientific" investigations into the background of participants in pornography or its effects on them afterwards.[985] Such investigations would certainly be extremely difficult—perhaps impossible—to design and conduct given the clandestine character of the pornography industry. Reliable conclusions about the number and characteristics of performers in pornography will likely remain as difficult to reach as, for example, solid estimates of the number and characteristics of illegal aliens.[986]

What we have been able to discover, however, is deeply disturbing, and, we think, based on substantial evidence from a variety of generally credible sources. Somewhat to our surprise, the testimony of law enforcement officers, of current and former performers in pornography, and of those involved with pornography "behind the scenes" has rarely been in conflict. Further, significant and useful information is available from court cases, from books and "adult" magazines, and from "adult" film industry publications. If on the whole we believe our understanding of the problems faced by performers in pornography is incomplete, and that our findings and recommendations must be largely tentative, we also view the state of the evidence as highly suggestive. And we think it points to the need for action as well as for further study.

## THE PERFORMERS

The most basic questions about performers in pornography—who they are, and how they came to appear in sexually-explicit material—are unfortunately the most difficult to answer decisively. For reasons that are largely obvious but will be explored later, anonymity is a valued commodity among pornography performers: apparently even the best known models frequently do not use their real names for their appearances.[987] And in much pornography (such as that shown in video arcades) the performers are not identified at all. Thus it would have been difficult to conduct independent investigations of their backgrounds even if resources permitted it; instead we have relied on testimony and other information in the public record. What that evidence shows about their age range, background, motivations, and path of entry into modeling is a crucial backdrop to examination of what the sex industry demands of them.

### Age

Perhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth. As one law enforcement officer who has extensively investigated the production of commercial pornography told us, "they [the producers] are looking for models that look as young as possible. They may use an eighteen-year-old model and dress her up to look like she is

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[985] The survey Diana Russell conducted is the only American survey addressing the issue that we have seen. Houston Hearing, Vol. I, Diana Russell, p. 283. See, *Badgley Report*, supra note 924, addressing the issue in Canada.

[986] See, e.g., United States General Accounting Office, *Problems and Options in Estimating the Size of the Illegal Alien Population*, Report to the Chmn. of the Subcomm. on Immigration and Refugee Policy of the Comm. on the Judiciary, United States Senate (1982) ("Current estimates of the size of the illegal alien population in the United States are unsatisfactory and it seems unlikely that more precise estimates can be derived soon." *Id.* p. 19.)

[987] Models (particularly women) tend to choose short, suggestive names: Linda Lovelace, Desiree Lane, Ali Moore, Dick Rambone. The majority of the witnesses appearing before us who said they had appeared in sexually-explicit material testified under truncated or fictitious names. The use of assumed names seems to be rooted in far more than the longstanding theatrical practice of giving upcoming actors new names for "box office" reasons—rather it appears to be closely related to the models' need to conceal their involvement from their families, friends, and future employers.

15"[968] Female models appearing in "mainstream" commercial pornography appear rarely to be over thirty years old or even in their late twenties; indeed, most whose age we have been able to gauge began their careers in their late teens.[969] Indeed, one former model who now works in the front office of an "adult" video company explained her decision to retire thus: "Good roles for women over nineteen years old have become few and far between."[970] William [redacted], a leading figure in the "adult" film industry, described it simply as "essentially an overage juvenile hall."[971] While male models apparently can enter and remain in the industry at a somewhat older age,[972] on the whole we find Mr. [redacted] imagery particularly apt.[973]

### Personal Background

Along with their youth, models in sexually-explicit media seem to share troubled or at least ambivalent personal backgrounds. Although many described or implied unhappy experiences during childhood, we are not able to say with scientific certainty whether their family backgrounds were worse or better than "normal."[974] One model recently declared before a Senate subcommittee that it is a "myth" that models have "unhappy childhoods."[975]

Despite this claim, many other models have painted a drastically different picture of their families—broken marriages,[976] early parental death,[977] and intense family conflict.[978] Many—including the model who denied the "myth" of unhappy childhoods reported having suffered early sexual abuse.[979] Professor Russell, moreover, has found a "highly statistically significant relationship between incestuous abuse and being asked to pose for pornography."[980] In her study she found that "girls and women who are being asked to pose for pornography . . . are those who have already been seriously sexually abused by a relative."[981] Sketchy as the evidence is, we are struck by the relative rarity in the material and testimony we have studied of claims regarding positive features of families of models.[982] If anything, the balance of the evidence suggests that models have typically grown up in circumstances of parental deprivation, abuse, or both.[983]

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[968] Los Angeles Hearing, Vol. I, William Roberts, pp. 64–65. This emphasis on youth apparently took hold in hard-core sex films in the years after World War II. Before then models who appeared in what were at that time known as "stag films" were in their late twenties or early thirties. Sampson, *Commercial Traffic in Sexually Oriented Materials in the United States* in 3 *Technical Report of the Commission on Obscenity and Pornography* 1, (1971), p. 186.

[969] The ages at which some prominent "X" rated film models apparently began performing are, so far as we can determine from materials on the public record, as follows: Angel (18); Ali [redacted] (18); Amber [redacted] (19); Jessie [redacted] (18 or 19); Mindy [redacted] (19); Shauna [redacted] (18); Tiffany [redacted] (18); Nikki [redacted] (18); Ginger [redacted] (19 or 20); Richard [redacted] (20 or 21); Seka (24); Samantha [redacted] (28); Chelsea [redacted] ("fortyish"). The ages listed above are largely taken from articles or interviews published in adult film industry trade publications or in commercial, sexually-explicit "guides" to adult films and videos. As a result, it is possible that models or interviewers understated their ages to maintain a desirable public image. Nevertheless, in 1971 Sampson, *supra*, note 968 found that "many current female performers appear to be in their late teens or early twenties." *Id.* p. 188. Further, about half of our witnesses who had appeared in sexually-explicit films or photos began such performing in their teens: Lisa (Washington, D.C.); Jeff (Washington, D.C.); George (Los Angeles); Chris (Los Angeles); Harry [redacted] (Miami); and Linda [redacted] (New York). See also Lederer, *Then and Now: An Interview with a Former Pornography Model*, in *Take Back the Night: Women on Pornography*, pp. 57-58 (began nude modeling immediately after graduation from high school) (hereinafter "Lederer Interview"); *People v. Fixler*, 128 Cal. Rptr. 363(Ct. App. 2d Dist. 1976) (use of fourteen-year-old model by large scale commercial publisher of sexually-explicit magazines).

[970] *Where Are They Now?*, Adult Video News, (Aug. 1985), p. 52.

[971] Los Angeles Hearing, Vol. I, William Margold, p. 411.

[972] Bennett, *Breaking into X-Rated Films, A Guide for Prospective Porn Stars*, Hustler Erotic Video Guide, (May 1986), p. 71, (Interview with William [redacted]).

[973] See, *Interview: Cecil Howard*, Adult Video News 1 (October 1984) (interview with prominent "adult film" producer) ("AVN: Does it appear to you that we're now seeing younger and younger girls doing films? CH: It's true and I think that's horrible." *Id.*, p. 24.)

[974] Thus Professor Russell in her study found no significant difference in measures of "social class" between women who were asked to pose for pornography and those who were not. Houston Hearing, Vol. I, Diana Russell. Unfortunately, her study did not determine which respondents had actually agreed to pose, so provides only suggestive evidence regarding that subgroup.

[975] *Effect of Pornography on Women, Children, Hearings before the Subcomm. on Juvenile Justice, Comm. on the Judiciary, U.S. Senate*, 98th Cong., 2d Sess., (1984), p. 315, (Statement of Veronica [redacted]) ("I came from a very loving family. That core of love has always been my strength.") (hereinafter cited as 1984 *Senate Hearing*.)

[976] Statement of Valerie [redacted] (Washington, D.C.); Lisa (Washington, D.C.); Jeff (Washington, D.C.); *Getting Down with Candida* [redacted] Forum, (April 1986), pp. 42, 45. *From Cheerleader to Smut Star*, Adult Video, (April 1986), pp. 8-9, (interview with Ali [redacted]) (hereinafter "Ali [redacted] Interview"), Christy [redacted], Best of Erotic X-Rated Film Guide, p. 24(no.8).

[977] Amber [redacted]: *Porn's Busiest Beaver*, Hustler, (April 1986), pp. 24, 30.

[978] 1984 Senate Hearing, *supra* note 975, p. 1064, (Testimony of Linda [redacted]).

[979] Vera, "Beyond Kink," Puritan, copy of article submitted with letter of Veronica [redacted] dated February 8, 1986, to Commission (abuse by Stranger); Statement of Jeff (Washington, D.C.) (babysitter); Lisa (Washington, D.C.) (uncle); Valerie [redacted] (Washington) (stepfather and stepbrothers); Lederer interview, *supra* note 969, pp. 57–58; See also, Statement of George (Los Angeles) (exposure by father to hard core pornography during childhood and early teens, considered by witness to have been major contributing influence in decision to perform in such material). Joanne [redacted], X-Rated Cinema, (May 1986), p. 63 ("I was a real little nympho until I was about eighteen. I got tired of every man and his brother making a pass

### Economic Circumstances

If it is not possible to speak with certainty about the family backgrounds of the young women and men who become "models," it nevertheless seems clear what chiefly motivates their decision to appear in sexually-explicit material: financial need. As one former model put it when asked why most women enter nude modeling:

> A lot of women are hurt or crazy women under stress. Yes, most women come in under a lot of stress. They're usually desperate when they first come in—maybe they need money for some emergency, like I did, or they've gone as long as they can doing odds and ends or working at (menial) jobs and they finally just have to pay their bills. I met a woman whose kid was in the hospital, and I met lots of women who were financially strapped. There were also many illegal aliens there who couldn't work regular jobs even if they had the skills because they didn't have their green cards. . . . [T]hey certainly know how to get you to do what they want. Some women are so bad off that they just go immediately into hard-core films.[984]

One prominent model recently described her entry into the business in similar though less sympathetic terms.

> I had a sugar daddy who was, you know, keeping me. Paying for everything. I didn't need a dime of my own and never had to work. Then I guess his wife found out, and he ran back to her, breaking it off with me. I was out in the cold. Then a friend of his asked me if I was interested in doing some masturbation stuff on video. I needed the money and said okay.[985]

Although not a universal feature of models' accounts,[986] with striking regularity they speak of money and dire financial need as critical factors in their decision to model.[987]

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[980] Houston Hearing, Vol. I, Diana Russell, p. 310I.

[981] *Id.* p. 310M. In Professor Russell's view, men seeking to make pornography are adept at selecting previously victimized women. *Id.*

[982] Of the models who testified before us, or otherwise have discussed their past publicly, only a handful even refer to their families except to describe such problems as divorce, conflict or abuse. *Compare.* Statement of Dottie ✂ ("My parents raised me in a happy, healthy home"); and testimony of Veronica ✂, *supra* note 975, with text to notes 976–979. Many, however, have given interviews or testimony without any reference at all to their families; thus we do not know what they would say about their upbringing. That so high a number were involved with explicit sex modeling by their late teens certainly does not suggest to us that their silence should be construed as evidence of a happy childhood and adolescence. See note 979 *supra*.

[983] We note as well the similarity of the backgrounds of many of these models to those of prostitutes. See, e.g., Silbert & Pines, *Early Sexual Exploitation as an Influence in Prostitution*, 28 Social Work 285(1983) (in sample of 200 current and former female prostitutes 60 per cent had been sexually abused as juveniles); Silbert & Pines, *Entrance into Prostitution*, 13 Youth & Society, (1982), p. 471, (in same sample only half came from two-parent homes. *Id.*, p. 475; only nineteen per cent and thirty-two percent had a "positive relationship" with, respectively, their fathers and their mothers. *Id.*, p. 480.

[984] Lederer Interview, *supra* note 969, pp. 58–59.

[985] *Amber* ✂ : *Porn's Busiest Beaver*, Hustler, (April 1986), pp. 24, 30.

[986] See, *Interview—Richard* ✂ , Adult Video News 1 (1984) (made his first "X" rated film in 1968 at age twenty or twenty-one because "I wanted to know what it was like." *Id.* p. 22). Some other models do not clearly refer to financial motivation as a factor in their career decision. Thus Veronica ✂ described to a Senate Subcommittee in 1984 then decided, four years before the hearing, to "write or forget my fantasy to become a writer" and finally to enter "X" rated films. Veronica ✂ 1984 testimony represents the only statement by a current or former model of which we are aware which seems flatly to contradict the assertion that financial need is the overriding reason for entering nude modeling; unfortunately, it not only gives no verifiable details of her previous career but also seems at least partially inconsistent with some of her published statements. See, ✂ , *Beyond Kink*, *supra* note 975 (describing (1) how, in 1979, she lived in Paris with "Roger" and, in 1980 how (2) "Mistress Antoinette" placed her "in beautiful bondage" on a tree from which she was "bound and suspended" while "her husband silently (took) pictures.")

[987] See, e.g., *Heather* ✂ , Erotic X-Film Guide 28 (May 1986) (former model, "What was I gonna do when the money stopped coming in? I couldn't live, I couldn't survive, because it was the money that kept me going." *Id.*, p. 58);

at me."); *Interview with Lynn Ann* ✂ , Adult Cinema 64(Vol. 5, No. 2) (1986) (". . . any orgies that even went on were while I was living at home. At the tender age of 16." *Id.* p. 68.); Ali Moore Interview, *supra* note 976, p. 54 ("I had a rough childhood. Some things I'd rather not discuss, and it left me kind of gun shy when it comes to sex.")

[redacted] ."[988] As a representative of United States Prostitutes Collective put it: "For women working in the sex industry, prostitution and pornography are about money, not sex."[989] Not surprisingly, Professor Russell found that women who had been asked to appear in pornography were significantly poorer than other women in her sample.[990] From what we have learned about the rigors and risks of sex modeling, it is difficult to imagine any overriding motive other than serious economic need for such a momentous decision.[991]

## THE JOB

When that decision is made, and for whatever reason, the model enters a world averse to public scrutiny and almost wholly unconcerned with public accountability. In our own examination of the commercial "adult" film and magazine industries we received little information from the industries themselves regarding the position of performers, although we did find at least one industry spokesman, William [redacted] , remarkably candid and forthright on the subject. Fortunately, a substantial amount of information in this area is available from knowledgeable law enforcement sources, court cases, and, of course, performers themselves. The view of performers' lives which they provide is invaluable and grimly fascinating from the methods of recruitment to the experience of performing to the likely aftermath in personal career directions.

### Recruitment

For most young women in commercial pornography, entry into "modeling" seems to occur almost without serious thought. One now famous model described her own initiation in surprisingly casual terms:

> Well, I answered an ad in the paper. It was for a modeling job. It did not say, "adult modeling," or "nude modeling" or anything such as that. I went in and it turned out to be nude modeling. The first day, I took shots for Penthouse. So I kept on going and before I knew it, three months later I was doing adult films.[992]

Typically young women and men answer advertisements seeking "models," and only later discover nudity or sexual intercourse is involved in the work.[993] Often, the "model agencies" placing the ads apply strong pressure to convince prospects, as one former model has recently described it:

> The majority of people in this business, they're heartless. They take a little girl off the street, fresh out of high school. They sit there and keep pushing it in her face and asking her

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[988] [redacted]

[989] Los Angeles Hearing, Vol. II, Margaret Prescod, p. 216. Ms. Prescod pointed out, as did numerous other witnesses, that the "feminization of poverty" had left the sex industry as "one of the few alternatives open to women to get out of, or refuse poverty . . . ." *Id.*, p. 216.

[990] Houston Hearing, Vol. I, Diana Russell, p. 310F.

[991] One alternative motive advanced by a major male model (Jack [redacted] ) is intriguing: "I was so insecure with [my body] that I wanted to build myself into something that everyone would say was beautiful whether I believed it or not." *Male Model*, supra note 928, p. 183. Obviously the decision to enter sex modeling is an extremely complex one that involves far more than mere economic need. It is likely, for example, that childhood sexual abuse plays a substantial role in predisposing individuals to consider such activity. See, text to notes 974–983, supra. Research on the factors influencing such a decision is clearly needed—yet it does seem clear that what the models themselves say when asked about their motives is that financial need was paramount. Even Jack [redacted] , when asked why "most" men go into nude modeling replied: "One, because they need some bucks and somebody offers them a hundred bucks or so if they will pose nude for them. The same reason some people might end up in prostitution." *Id.*, p. 186.

[992] *Interview: Ginger* [redacted] , Adult Video News, (Feb. 1985), p. 30.

[993] See, e.g., Los Angeles Hearing, Vol. I, Chris, p. 92; Los Angeles Hearing, Vol. II, Charles Sullivan, p. 65; Los Angeles Hearing, Vol. II, Catherine Goodwin, pp. 78–79.

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*Ali* [redacted] *Interview*, supra note 978, p. 9 ("Adult Video: . . . Why do you do it? Ali: Money, money, money. That is the only reason in the world."); Statement of "Lisa" ("The money [offered for nude modeling] wasn't all that great but I was on welfare . . ."); *Interview: Harry* [redacted] , Adult Video News (April 1985) ("I was making a whopping $75.00 per week [as a New York actor]. I needed to supplement my income."); letter from Kellie [redacted] to United States Department of Justice of March 21, 1986 [former stripper and nude model] stating "the women who get involved in pornography do so not because of a lack of morals but because of economic necessity"); Candida [redacted] *Interview*, supra note 978, p. 46 ("Then one summer, it all fell apart . . . I had no support. I got a job in a porn film and thought, why not?"); C. [redacted] , *Male Model* 165–66 (among males involved in nude modeling the phrase "At the time, I needed the money" is the "usual explanation" for their initial involvement. *Id.*, p. 179.) Some models, of course, may well have been coerced into appearing in sexually-explicit material. See Section B-3-b, *infra*; for them money could not be a factor in their participation.

> if she'd like to do porn. and she keeps saying "No" and "No"-and they keep on pressing. . . .[994]

Others enter from nude dancing[995] or prostitution.[996]

Whatever their entry route, however, well established, profitable enterprises exist to provide the services of female models to producers of "X" rated material.[997] "Model agents" receive a flat daily fee for each model provided, and provide producers with books containing pictures of those models available.[998] One such agent, William ✂ , described to us the "legitimate ad" he regularly places in a Hollywood publication that, in his words, "lures, literally lures people in on the guise of getting [a legitimate acting] job."[999] After they arrive at his office, Mr. ✂ tells the prospects, who "are all filled with the idea of becoming a star," what his agency actually wants, and then warns them of the hazards of sex modeling.[1000] "Many people," he continued, "years later, would call and thank me for not letting them into the industry, because I would warn them out. I didn't need that on my conscience."[1001] In view of the overall tactics employed by him and other agents, Mr. ✂ "conscience" on this point seems somewhat overnice.

With regard to men involved in "modeling," by contrast, recruitment practices seem far more straightforward. Males have a substantially more difficult time breaking into pornographic modeling; where men are concerned, according to Mr. ✂ , "[t]his is a closed shop" with only a few "superstars" who "end up in all the videos."[1002] Those who are able to enter the business often do so through the good offices of a new or established female performer.[1003] Some male models, on the other hand, drift into pornography in ways similar to women—through nude dancing, prostitution, or clever persuasion.[1004] Recruitment of men may be easier because of what many male performers describe as the ego gratification of working in pornography.[1005]

## Coercion

Efficient as it is, the normal recruiting process for pornographic models is apparently not fully adequate to meet producers' needs. It is an unpleasant, controversial, but in our view well established fact, that at least some performers have been physically coerced into appearing in sexually-explicit material, while others have been forced to engage in sexual activity during performances that they had not agreed to beforehand. We heard direct testimony from three unrelated women who each described how brutal force was used to push her into pornography.[1006] The credibility of that testimony was strongly reinforced by the testimony of representatives of "sex workers,"[1007] by a victim counselling agency,[1008] and extrinsic evidence on the public record.[1009]

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[994] Heather ✂ Interview, *supra* note 987, p. 30. See, Los Angeles Hearing, Vol. II, Catherine Goodwin, pp. 78–79 (after adolescent had posed for "fashion/glamour" photos, photographer "began to persuade and coerce her to do the S&M type of posing. . . .").

[995] Washington, D.C., Hearing, Vol. I, Lisa, p. 61, (nude dancing at age sixteen, then "modeling" at eighteen); Joanna ✂ Interview, *supra* note 979, pp. 60–61 (nude dancing and stripping at age sixteen, "film career" at age twenty).

[996] Chicago Hearing, Vol. II, Teresa Stanton.

[997] See, *People v. Souter*, 178 Cal. Rptr. 111(Ct. App., 2d Dist., 1981) (pandering conviction of principal of World Modeling Agency, which provided performers for commercial pornography productions); *People ex rel. Van DeKamp v. American Art Enterprises, Inc.*; 142 Cal. Rptr. 338(Ct. App., operation which engaged its performers through "model agencies" *Id.*, p. 340).

[998] Los Angeles Hearing, Vol. I, William Roberts, p. 64.

[999] Los Angeles Hearing, Vol. I, William ✂ , pp. 402–03.

[1000] *Id.*, p. 402.

[1001] *Id.*

[1002] Bennett, *Breaking into "X" Rated Films*, Hustler Erotic Video Guide 71 (May 1986) (interview with William ✂ ). In this article Mr. ✂ seemed to be referring to heterosexual male modeling. With regard to modeling in homosexual publications and films, there appears to be a much broader demand for new and different faces. See generally, Male Model, *supra* note 926, pp. 172–86.

[1003] *Id.*, p. 72. See, *Porn Star Confessions*, Erotic X-Film Guide 51, (May 1986), p. 60 (story of Marc ✂ , introduced into "Swedish Erotica" through Lisa ✂ , established model).

[1004] Los Angeles Hearing, Vol. I, George, p. 86, ("dancing and nude modeling"); Washington, D.C., Hearing, Vol. I, Jeff, p. 168 (prostitution); *Male Model*, *supra* note 926, pp. 176–77 (interview with "John ✂ " describing gentle persuasion into nude modeling).

[1005] See, *Male Model*, *supra* note 926, pp. 182–86 (comments of Jack ✂ , whose "reward" is principally "self-esteem" *Id.*, pp. 182.). But see, Richard ✂ Interview, *supra* note 986, p. 24 ("AVN: But how much of it do you like? RP: 15% is pleasure and 85% is trauma and hard work for which I'm very well paid.").

[1006] See, *generally*, Washington, D.C., Hearing, Vol. I, Valerie ✂ , p. 217; Washington, D.C., Hearing, Vol. I, Sarah ✂ , p. 175; New York Hearing, Vol. I, Linda ✂ , p. 47; Ms. ✂ testimony was actually a short summary of her full account in L. Lovelace, *Ordeal* (1980), in which she described her forced introduction and partici-

We also find highly credible the assertion of law enforcement officers that models more often face coercion to get them to perform specific sex acts that were not contracted for.[1010] As one of them put it:

> Coercion comes in, especially like some of these witnesses have testified, in the area of anal sex, which many of the models don't want to get into. It really comes into a factor in the bondage and S&M type films. I have talked to models and I have seen films where it's quite obvious that the model had no idea as to what they were getting into. Part of an S&M film, when they start torturing the victim, tying them, whipping them and putting cigarettes out on their body, is the showing of pain. This is what sexually excites some people.
>
> Obviously we are not dealing with people that can act, so they can't act the pain. Therefore the pain is very real. It's quite apparent these people do not realize what they have gotten into once they start the filming.[1011]

Certainly their pain may not be lightly dismissed.

At the same time we may not dismiss the strong assertions of producers, agents, and models in the sex industry that performers are generally safe from physical coercion.[1012] Actual force or threat of force does not, indeed,

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[1007] Los Angeles Hearing, Vol. II, Priscilla Alexander, p. 229. (Education Coordinator, COYOTE, National Task Force on Prostitution) ("There is certainly evidence that some women have been forced to perform in sexually-explicit productions." *Id.*, pp. 229–30.)

[1008] Chicago Hearing, Vol. II, Terese Stanton, (founding member of Pornography Resource Center which provides help to victims of pornography) ("We have gotten calls from both women and men who are currently being forced into the making of pornography—asking us if there is anything we can do for them." *Id.*, p. 6.)

[1009] In hearings before the Minneapolis City Council in 1983, one woman related how she was forced into pornographic performance. *Public Hrgs. on Ordinance to Add Pornography As Discrimination Against Women* (1983), Session II p. 49–52. In those same hearings Professor Kathleen Barry, author of *Female Sexual Slavery* (1984) submitted a letter describing how some pornography is produced by pimps through the rape of prostitutes, for reasons which "include personal pleasure of the pimp and his friends, blackmailing the victim by threatening to send them to her family, and selling to the pornographers for mass production." *Id.*, Session I, pp. 58–59. A street outreach worker confirmed that young prostitutes are often raped by their pimps, with the rapes photographed, held as a weapon to insure their continued submission, and later "published in pornographic magazines without their knowledge and consent." *Id.* Session III, p. 77 Because pornography and prostitution are so strongly linked, it may of course be inferred that the coercion which historically and currently afflicts the latter will play some role in the former. See, R. Rosen, *The Lost Sisterhood Prostitution in America, 1900–1918* (about 7.5 per cent of prostitutes at the turn of the century were physically coerced into the profession); Silbert & Pines, *Entrance into Prostitution*, supra note 987, p. 484 (four per cent of present-day sample of prostitutes listed "physical threat" as the "major reason" they entered prostitution); *Badgley Report*, supra note 1013, p. 988 (3.6 per cent of juvenile male prostitutes and 15.9 per cent of juvenile female prostitutes were forced into prostitution). Finally, although it has not yet come to trial, we note that a state court in New Mexico has received substantial testimony supporting the existence of a pornography ring which kidnapped a young woman for use in a pornographic film but killed her out of fear of discovery—testimony sufficient for the court to find probable cause and bind the suspects over for trial. See, series of articles from Albuquerque *Journal* and *Tribune*, beginning February 15, 1986, on file in Commission Archives. Whether or not a conviction for murder is obtained in that case, we believe the evidence is sufficient to strongly indicate that forcible tactics were used to secure female models for pornography. See also, Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women's L.J. 5, (1984), pp. 20–21.

[1010] Los Angeles Hearing, Vol. I, William Roberts, pp. 98–100; Los Angeles Hearing, Vol. II, Catherine Goodwin, pp. 78–79.

[1011] Los Angeles Hearing, Vol. I, William Roberts, pp. 98–100. See note 1015, *infra*.

[1012] Los Angeles Hearing, Vol. I, Lee Baker, p. 203B-7-8, (President, Adult Film Assn. of America) (describing coercion of Linda [redacted], if it did occur, as "a tragically unfortunate but nevertheless isolated phenomenon."); Los Angeles Hearing, Vol. I, William [redacted], pp. 414–415; Statement of Candida [redacted] (denying any coercion used in

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pation in pornography by her husband and "manager" Chuck [redacted]. Mr. [redacted] discounted her testimony on the basis that "if you put a gun to the head of the girl who's performing fellatio on you, what would be left to perform fellatio on." Los Angeles Hearing, Vol. I, William [redacted], p. 414. This view is neither faithful to the actual account of Ms. [redacted] experiences nor convincing in its logic. Harry [redacted], who performed with Ms. [redacted] in "Deep Throat," has more cogently questioned the validity of her assertions by contradicting certain details of her account of the filming of that movie. Harry [redacted] Interview, supra note 987, p. 28. Nevertheless he ultimately conceded that he does not know whether Ms. [redacted] was coerced into making "Deep Throat" or other movies, *Id.*, and at least one impartial chronicler of the world in which she moved during the 1970s has apparently found her story fully credible. R. Miller, *Bunny: The Real Story of Playboy*, (1984), pp. 162–66. Based on their demeanor, their lack of any obvious motive to falsify, and the other evidence we have heard, we can state that we believe the testimony of Linda [redacted], Valerie [redacted] and Sarah [redacted] to be true, and, in view of their sufferings from continued public exposure in this light, courageous as well.

appear to be a normal part of "mainstream" pornography production.[1013] Rather it seems concentrated in the fringe areas of bondage, sadomasochism, and home-made, noncommercial pornography. Force used to induce young women to enter "mainstream" pornography appears to be applied most often not by filmmakers but by dominating "boyfriends" who in fact play the role of pimp.[1014] All this said, it is nevertheless troubling that the Adult Film Association of America nowhere includes in its "unofficial credo" a pledge to eschew all forms of coercion in recruitment of models.[1015]

**Contractual Terms**

Those models who enter pornography voluntarily—that is, without having been physically forced—can expect to enter their new employment under contractual terms quite unlike any others we know of. They will by most standards be well paid—from $250 a day for established models[1016]—but they will be paid strictly in cash[1017] and normally by the number and type of sex acts performed.[1018] Fringe benefits such as medical insurance are unknown.[1019] Models sign a standard release form which gives the film producer or the photographer complete ownership of, and unlimited rights to the material produced.[1020] Once they leave the movie set or the film studio, they have no guarantee of future employment and no ability to control the use of the material in which they appear.

**Working Conditions**

During a typical day of filming an "X" rated movie or video a performer is expected to engage in at least two sex scenes,[1021] in a manner pellucidly described by Mr. [redacted] to prospective male "stars":

> You have to be a machine. You have to get it up, get it in and get it off on cue. You have to be able to completely divorce yourself from your surroundings and be able to function in any situation. For example, if you're working on location for a film shoot and staying at a motel for seven days, you have to cope with being in unfamiliar surroundings, getting irregular sleep and living on McDonald's and Kentucky Fried Chicken, and still be able to perform sexually no matter what else is on your mind.[1022]

Workdays are twelve to fourteen hours long, with videos requiring three and films seven days to shoot.[1023] During the filming of sex scenes it appears to be standard practice to restrict access to the set to the models and film crew; one actor is reported to have "hastily [covered] his private parts" when a reporter could see onto the set.[1024] In mainstream por-

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[1013] See, Los Angeles Hearing, Vol. I, George, p. 87 ("in career of over 100 films, I have never seen a director physically grab [a model] and force her to do a scene.").

[1014] See, L. [redacted], Ordeal (1980); Washington, D.C., Hearing, Vol. I, Valerie [redacted], p. 217.

[1015] Los Angeles Hearing, Vol. I, Les Baker, p. 203B–3. The A.F.A.A. acknowledges five "responsibilities" which center on protection of children and nonconsenting adults from seeing pornography: none of them relate to problems of adult performers. See, Los Angeles Hearing, Vol. I, George, pp. 86–87. ("I have seen some directors get really violent and have a lot of yelling and throwing things and threatening of the young ladies, they will never work again if they don't want to do a scene. . . . Then, you know, every time I have seen the girls, always regret it afterwards.; there has been a lot of pain involved with doing scenes they didn't want to do".)

[1016] Los Angeles Hearing, Vol. I, William Roberts, p. 65; Los Angeles Hearing, Vol. I, Chris, p. 98; Los Angeles Hearing, Vol. I, George, p. 85, (noting that he "would make between $1,000 and $2,000 a week"). William [redacted] estimates that male "superstars" earn $80,000 per year, while "newcomers" earn "around $200 per day." Bennett, supra note 972, at 71. The highest salary currently paid—to a female "superstar"—appears to be $17,000 per day. Heather [redacted] Interview, supra note 987, p. 58 (statement of Bruce [redacted], prominent X-rated film producer).

[1017] Bennett, supra note 972, p. 71; Los Angeles Hearing, Vol. I, George, p. 91.

[1018] Los Angeles Hearing, Vol. I, George, p. 85; Los Angeles Hearing, Vol. I, William Roberts, p. 65 ("going rate being about $250 per sex act").

[1019] Los Angeles Hearing, Vol. I, George, p. 89.

[1020] Los Angeles Hearing, Vol. I, William Roberts, pp. 70–71. For the extraordinary effects of such releases See, *Faloona v. Hustler Magazine*, 607 F. Supp. 1341(D.C. Tex. 1985) *appeal docketed*, No. 85-1359 (5th Cir. 1985) (child whose nude pictures appeared in *Hustler* had no right to revoke mother's consent to publication, even though pictures had been taken for different publication and sold to *Hustler* by photographer). *See also*, *Shields v. Gross* 58 N.Y. 2d 338 (1983) (dismissing Brooke Shields' efforts to stop publication of nude, highly eroticized pictures taken of her at age ten with her mother's consent).

[1021] Bennett, supra note 972, p. 72.

[1022] *Id.*

[1023] *Id.*

[1024] Goldman, *On the Set of An Adult Film*, Adult Video News, (1984), p. 10.

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inducing her to become a model); 1984 Senate Hearing, supra note 976, p. 316 (testimony of Veronica [redacted]) (denied ever meeting "anyone, man or woman, who was not participating of his or her own free will.").

nography females, but not males, are normally expected to engage in homosexual as well as heterosexual sex,[1025] while in male homosexual pornography women do not perform at all.[1026]

**Health Risks**

Precisely because sex is their job, models face health hazards of forbidding intensity. Working three to four days a week, with two sex scenes each day,[1027] any one model may have twenty-four to thirty-two different sexual partners every month, just through work. Even though some performers state that they receive regular medical check-ups,[1028] the odds of contracting sexually transmitted diseases are very high—particularly because performers do not even have the option of using condoms or other "safe sex" techniques.[1029] Not surprisingly, even the rumor that a model is infected with a sexually transmitted disease can ruin his or her career,[1030] but just as obviously such a rumor will often fail to spread before the disease has. Further, it is only the established "stars" who can be choosy about their partners.[1031] One of the best known male models described his own experiences in illuminating terms:

> When you're a nobody, it doesn't occur to you to be brave and ask, even though you have a lot at stake. I didn't worry too much about that until the Herpes stuff started to become real. Up until 1982, I had one clap scare. I went and received shots for it. I don't know if I ever had it or not. But I had contact with a known carrier. In '82, we got pregnant for the first time, and having Herpes was the difference between a vaginal birth and a Caesarian section which made a significant difference to us. And I didn't have Herpes and I saw no reason to get it. So I began saying categorically that I wouldn't work with anyone that had Herpes. I had to do this one part with someone who had an active outbreak of Herpes, and we cheated the scene. The person put a towel in her thighs and I ended up f...ing the towel. We had no physical contact. Ironically enough, it turned out to be a beautiful scene."[1032]

When asked who the Herpes carrier was, the model replied that he had "kind of shielded it."[1033]

The advent of Acquired Immune-Deficiency Syndrome (AIDS) might have been expected to produce drastic changes in sex industry practices, but the prevailing attitude seems best reflected in the following, recent comments in a *Hustler* interview of Amber ✂, a leading "porn star":

> *Hustler:* You're f...ing so many men these days, aren't you afraid of AIDS? Many actors in the business are bisexual.
>
> *Amber:* There's an incredible fear of AIDS sweeping through the X-rated-film business right now. All of my girlfriends are talking about it. We're scared to death that we'll find out in three years we've only got a few months left.
>
> *Hustler:* Why do you continue your promiscuous career then?
>
> *Amber:* I get a blood test regularly and am very careful about the people I work with. Hey, life's a f...ing gamble anyway, and there is where I want to be. I can't think of doing anything else. That's not to say I'm reckless. For

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[1025] *See generally,* Badgely Report, *supra* note 924, pp. 1213–21 (analyzing contents of 11 pornographic magazines, with lesbian scenes being "a popular subject" while homosexual male portrayals were nonexistent). In a recent review *Hustler* urged readers to "check out" a film because of the "daring" performance of a male lead as a "bisexual film director." The review continued: "no, he doesn't actually make it with another guy; this flick is daring, but not *that* daring." *Hustler,* (April 1986), p. 18.

[1026] A recent video which included bisexual activity involving several men and one woman was dubbed by one "erotica" reviewer as "not, strictly speaking, a gay tape" and "probably different from anything you've ever seen." Review, *Hustler Erotic Video Guide,* (May 1986), pp. 90–91.

[1027] The typical work week described by one of the models in testimony before us. Los Angeles Hearing, Vol. I, George, p. 85.

[1028] *See, e.g.,* Amber ✂ Interview, *supra* note 977, p. 30; Los Angeles Hearing, Vol. I, George, p. 89.

[1029] *See,* Richard ✂ Interview, *supra* note 986, p. 25 (description by interviewer of "the only time I've seen a rubber being used in a porno movie.")

[1030] *Id.,* p. 30; Bennett, *supra* note 972, p. 72.

[1031] Richard ✂ Interview, *supra* note 986, p. 30.

[1032] *Id.; See also,* Los Angeles Hearing, Vol. I, George, p. 89, (encountered S.T.D. in fellow performers); Lederer Interview, *supra* note 989, p. 66, ("Women who work in the pornography business always have vaginal trichomoniasis or some infection from the working conditions, which run from bad to simply intolerable. At one point there was an epidemic of hepatitis and mononucleosis. The communicable diseases spread quickly." *Id.,* p. 66). That a "sex worker" population would be highly vulnerable to sexually transmitted diseases should hardly come as a shock. *See,* W. Darrow, *Prostitution and Sexually Transmitted Diseases in Sexually Transmitted Diseases,* (K.K.Holmes ed. 1984), p. 109.

[1033] *Id.*

> instance. I won't f... some guy I know has been f...ing a bunch of other guys not for a lousy thousand dollars. It's not worth it to me, because if I get AIDS, then everyone I come in contact with [will] get it and not just the people I work with, but the people I love and care about too.[1034]

Of course, even an *occasional* sexual contact with a member of a high-risk group carries such a substantial risk of exposure to AIDS[1035] that the gamble Amber [redacted] embraces seems a peculiarly misguided one.

**Drug Use**

Along with the insidious threat of infectious disease, models face a more overt challenge to their physical health: drug use, and in particular, use of cocaine. Few aspects of the world of pornographic modeling seem less free from doubt than the dependence of most performers, at one time or another, on cocaine. The view of one prominent model that in her world "everybody goes through a drug stage"[1036] is perhaps overstated, but involvement of a substantial majority of performers in the use of cocaine seems highly probable.[1037] In the opinion of at least one model, drugs are necessary in her work because "you have to hide, you have to keep your feelings and emotions from being completely destroyed. Each day [in the industry] erodes them away."[1038] It is true that Mr. Les Baker, President of the Adult Film Association of America labelled the problem of drug abuse in his industry a "misconception," contending that such abuse "is a universal problem and we of the A.F.A.A. just a small part thereof."[1039] For him drug usage by pornographic models is simply part of an infection spreading through the whole "entertainment industry."[1040] William [redacted] put it somewhat more positively:

> I know that drugs are in my industry. I know that drugs are in almost any form of creative people. Some people seem to need them to do whatever they have to do.[1041]

We of course are in no position to compare the severity of drug abuse in the pornography industry with that in other fields; it is sufficient simply to note that by all accounts such abuse exists and inflicts serious damage on those it touches.[1042]

**"Modeling" vs. Acting**

The reference of Mr. [redacted] to the "creative people" performing in mainstream pornography raises for us, quite apart from the issue of drug abuse, a question of substantial importance in attempting to describe the role and the lot of models. To what extent is their work in fact "creative"? More bluntly, to what extent are they actors as opposed to glorified prostitutes? More than aesthetic judgments hang in the balance: for if the performing in sexually-explicit films can be called truly creative, it is possible to imagine it bringing intangible, subjective benefits to models that scrutiny of contract terms, working conditions and the like could never reveal. Fortunately, it is an issue on which models themselves seem largely in agreement. Mr. [redacted], himself a model, recently was asked, "Is acting ability and training an important factor [in breaking into "X" rated films]?"[1043] His answer was simple and instructive:

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[1034] Amber [redacted] Interview, *supra* note 977, pp. 26–30.

[1035] See, Curran, *The Epidemiology and Prevention of the Acquired Immune-Deficiency Syndrome*, 103 Ann. Internal Medicine, (1985), pp. 657, 660 ("the risk of exposure to HTLV-III/LAV infection from a sexual encounter with an occasional partner for a gay man is very high, several times higher than for a heterosexual man or woman.") Blattner, *Epidemiology of Human T-Lymphotropic Virus Type III and the Risk of the Acquired Immune-Deficiency Syndrome*, 103 Ann. Internal Medicine, (1985), p. 665.

[1036] Ginger [redacted] Interview, *supra* note 982, p. 36.

[1037] See, Los Angeles Hearing, Vol. I, William Roberts, p. 98, ("Drugs play a very large part in [the pornography industry]; "George", *supra* note 1013, p. 84 ("eighty to ninety percent of the models do delve into cocaine"); *Interview, Traci Lords*, Adult Video News, (Aug. 1985), p. 34 ("Many girls go through mental breakdowns or get into drugs really bad. They feel so alone because there's just nothing there. So they get into the coke crowd and that's what keeps them going.")

[1038] Heather [redacted] Interview, *supra* note 987, p. 58. *Accord*, Joanna [redacted] Interview, *supra* note 979, p. 60 ("I guess I used [cocaine] to escape.")

[1039] Los Angeles Hearing, Vol. I, Les Baker, p. 203B-7.

[1040] *Id.*

[1041] Los Angeles Hearing, Vol. I, William [redacted], p. 413.

[1042] See, Los Angeles Hearing, Vol. I, Les Baker, p. 203B-7 (suicide of young model linked to drugs).

[1043] Bennett, *supra* note 972, p. 72.

> No. I don't think so. I think what's most important is being in the right place at the right time having the right connections and getting the right roles.[1044]

Mr. [redacted] went on to explain that the reason some male models "get their foot in the door" but "fail to make it to superstardom" is not for lack of creative drive or talent, but because they "cannot keep functioning reliably shoot after shoot."[1045]

One former model who testified before us was even more careful about distinguishing "modeling" from "acting":

> That also reminds me somehow, what I really wanted to say is when you are paid, to 'act' in these videos and films and stuff, you know, a lot of them say that I am an actor, I am an actress, or something, I am getting paid to act.
>
> When the producer or director pays you, after you leave, and before the shooting, you are paid not by how many lines you have or by what part you have you may have five lines or you may have 107 pages of dialogue, but you are paid per sex scene and that's how they quote it to you. If you have one sex scene a day you get like two hundred to two hundred fifty dollars for that, if you have two sex scenes, there's three or four hundred for two sex scenes. You are paid more for anal or girls are paid more for when they are working with two guys.
>
> So the models that say they are getting paid to act are only doing that to pretty much preserve their job security because, you know, anybody in the industry knows you are paid per sex act and not for acting.[1046]

Several former models have made similar public assessments, declaring flatly that "the market today is just not conducive to anyone who takes their acting seriously."[1047] Adult filmmakers shoot with only the barest of scripts, desperate simply to get the requisite number of sex scenes on film with an alluring title and package.[1048] The result for performers is that, in the words of a leading model:

> You never really forget the sex, you forget the movie. There's a lot of movies on the market that are exactly the same.[1049]

When asked to remember a movie she was proud of, she tellingly replied:

> Yeah, I think one of the films I am most proud of is 'Sex Waves.' There was acting in it, a story to it . . . it wasn't an excuse to have sex.[1050]

As one knowledgeable observer told us, sex scenes are normally shot in one take, and dialogue scenes in two or three:

> They do not spend a lot of time on the dialogue. They do not look for perfection. If they [looked] for perfection, most of the porn movies would still be in production. The people they are using are not well known actors and actresses and they are not very skilled in this area.[1051]

From our limited direct observation of "X"-rated material we must agree: skilled acting seems irrelevant to what is depicted.[1052]

There are, of course, those who disagree. One model speaks of always performing "within the character" he is portraying, even in sex scenes;[1053] another of how "the voice changes" while he plays the character he has portrayed through ninety-seven "features";[1054] a third (more dubiously) of the "ultimate acting challenge" involved in managing to "fool the public" into thinking she enjoys the sex, which she considers pure

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1044. *Id.*

1045. *Id.*

1046. Los Angeles Hearing, Vol. I, George, pp. 84–85.

1047. *Where are They Now, supra* note 970, p. 52 (statement of Jessie [redacted]). *Accord, Id.* (statement of Kay [redacted]) ("Empty plots, with soulless characters"), and *Id.* (statement of Candida [redacted]) ("An actress has very little say over the creative aspects of the films she's in.")

1048. *See,* Los Angeles Hearing, William Roberts, Vol. I, pp. 62–72.

1049. Traci [redacted] Interview, *supra* note 1037, p. 34.

1050. *Id.*

1051. Los Angeles Hearing, Vol. I, William Roberts, p. 68.

1052. This general distinction between "acting" and pornographic performing seems to have a parallel in the work of fashion modeling:

> Few male centerfold discoveries are fashion model material. Carl [redacted] and the select others who have put their clothes back on to forge a career all possess the requisite suit size—40 regular or thereabouts—as well as a special look and a special drive. On the other hand, the requirements for nude modeling, as one auditioner for a male flesh magazine explains, are "body, face, cock," not necessarily in that order.

1053. Richard [redacted] Interview, *supra* note 986, p. 24.

1054. *Male Model, supra* note 928, p. 183.

"exploitation."[1055] Clearly it is impossible to draw a bright, unwavering line between legitimate "acting" and pornographic "modeling."

Yet, ultimately we are faced with the simple fact acknowledged even by one of the most partisan of the adult film industry's fans: "Jealousy and most other human emotions (except fear and lust) are rarely expressed in adult films."[1056] Worse, as another sympathetic critic has conceded, "hard-core guarantees realism, . . . yet it remains incapable of showing pleasure."[1057] In a medium where virtually no human emotion (not even sexual pleasure!) can be expressed, and where, moreover, the performers are chosen neither for training in acting nor for natural acting talent, it seems to us all but ludicrous to call them "actors." We do not, therefore, consider it even the mildest paradox that the performers in live or filmed pornography are not treated on an equal footing as other performers by such organizations as Actors Equity and the Screen Actors Guild.[1058] Nor do we consider one of the rising male models to be wholly misguided in describing his job as, simply "[illegible]ing pretty girls for a living."[1059]

### Career Prospects

Just as sex modeling appears to offer few opportunities for creative expression, so too it seems to allow only sparse chances for long-term employment and remuneration. The life of a typical model's career is extremely short, usually not more than a few months or years. Of twenty new male "stars" each year in "adult" films, only about half a dozen will remain in the business for over a year.[1060] One of the few women to survive long in the industry, when asked what advice she would give to new female models, replied:

> I would tell them not to burn themselves out so fast. What happens is that they become big names and everyone wants them. A couple of years down the line, these girls are going to find people telling them they're overexposed. The typical line is something like we can't pay you a great deal of money because you're not a name yet. Then when they use you in every damn thing around and you become dependent on the income, they tell you we can't pay you very much because you're overexposed. They're setting themselves up for a really bad experience. I had a six year career. I think the reason it was that long is because I would only do three or four films a year. I tried to be choosy. These new stars shouldn't depend on hardcore as a full-time income. The directors are gonna grab them, chew them up, and spit them out real fast.[1061]

Some models manage to remain for longer periods in the "X" rated world, but after they reach the age of forty almost never appear naked, and only rarely appear in sexual intercourse.[1062] Women can almost never expect to hang on in any but minor roles after age thirty,[1063] although a few women have successfully moved into production and management roles.[1064] As for switching to legitimate acting, Mr. [redacted] has said bluntly, "if someone thinks he's going to get into mainstream through porn, he's deluding himself."[1065] Whether in films or traditional modeling, his observation seems to hold fast.[1066]

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[1053] Richard [redacted] Interview, *supra* note 986, p. 24.

[1054] *Male Model*, *supra* note 926, p. 185.

[1055] Ali [redacted] *Interview*, *supra* note 978, p. 9.

[1056] R. [redacted], *The X-Rated Videotape Guide*, (1984), p. 28.

[1057] G. [redacted], *Sex on the Screen: Eroticism in Film*, (Jacobs trans. 1985), p. 5.

[1058] It is our understanding that at least one prominent pornographic model is a member of Actors Equity, but that his membership depends on work he did in the legitimate theatre. See, New York Hearing, Vol. II, Colleen Dewhurst, pp. 190–91.

[1059] *Porn Star Confessions*, *supra* note 1003, p. 61. See, Joanna [redacted] *Interview*, *supra* note 979, p. 63 ("Films let me express a lot of my 'extra sexual desire.' If I didn't do films, I'd probably be in bed with the postman.")

[1060] Bennett, *supra* note 972, p. 71.

[1061] *Interview: Candida* [redacted], Adult Video News, (July 1985), p. 38.

[1062] [redacted], *supra* note 1145, p. 28.

[1063] *Id.*

[1064] One such woman is Candida [redacted], whose written statement is on file with the Commission. See *also*, Candida [redacted] Interview, *supra* note 978. Other prominent women who have survived in aspects of the "adult entertainment" business are Dottie [redacted] (management position at *Penthouse*), who testified before us; Seka (mail order pornography business), and Veronica [redacted] (writing for such "adult publications" as *Puritan* magazine). See, 1984 *Senate Hearing*, *supra* note 975, pp. 313–22 (statements of Seka and Vera).

[1065] Bennett, *supra* note 972, p. 72.

[1066] See, *Male Model*, *supra* note 926, p. 188 (statement of Jack [redacted] that "a lot of companies, film companies as well, won't hire you if you have done nude modeling whether it was for *Playgirl* or for *Playboy* or whatever.") See *also*, As for money, models in the sex industry collect none of the residuals on which professional actors expect to survive through lean years.[1067] One angry former model was quoted at the time she left the business as follows:

> And they deserve it. Do you know what it's like to have somebody pay you five hundred dollars to do two sex scenes, considering the money he's gonna get back? If you want to know something, I've got nothing really to show for it.[1068]

Her experience seems common, and her current dilemma wrenching.

**MODELING AND PERSONAL LIFE**

As a job, sexually-explicit modeling has dramatically serious defects—from poor working conditions to disease, drugs, economic insecurity, and exclusion from mainstream acting. Modeling, however, appears to have consequences for its participants that extend deeply into their personal lives as well. Limited as our inquiry could be with regard to the world of modeling in general—and to the personal lives of performers in particular—we would be remiss if we failed to take into account what evidence does exist. On the whole, we believe the evidence before us to be highly suggestive in this area—suggestive as much of the attitudes of others as of the feelings of the performers themselves.

A few of the performers in this field, to begin with, speak in glowing terms of the experience. One of them, a former "Pet of the Year" in *Penthouse*, described to us how her marriage had remained strong and happy after her selection for the honor and then during her subsequent career at the magazine in management positions.[1069] Another, speaking before a Senate subcommittee "not only for myself but for every woman that I know in the sex industry," declared:

> We do not see ourselves as victims. We do not need to hide in the shelter of being somebody's victim. We accept responsibility for our own lives.[1070]

And a third related how he had maintained a happy marriage and fathered two children during his career adding that, in his words, "I've made the decision that I will abide by the incest taboo, completely."[1071]

Reassuring as these comments are, they stand in a clear minority. William [redacted] once again offered the most straightforward summation of what modeling means for the personal relationships of models:

> Whenever I'm interviewing someone who wants to get into porn, I always ask them, "Do you have anybody that you will hurt by doing this?" It would be ideal if someone had no relatives—disenfranchised human being devoid of any past that would haunt them and any kind of present or future that they could destroy. If it's a man, he also better be single because, unless he's married to the most magnanimous of women, it will tear her insides out.[1072]

He went on to point out its effects on the personal reputation of women involved.

> And I'd like to point out that for a woman, there's even more of a stigma than for a man. She'll be called a prostitute and a whore and thought of as sleazy, cheap and slutty. And she has to understand that what she does now will haunt her the rest of her life.[1073]

Mr. [redacted] view, bleak as it is, has the weight of his thirteen years' experience in the field behind it; it is, moreover, continually echoed in the testimony and public statements of others who have knowledge of the industry.

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[1067] In this respect, as to a lesser extent with respect to age limitation, "modeling" in pornography is similar to traditional modeling—which, unlike acting, is not organized in unions and thus has never established residual, retirement, and fringe benefit standards. *See*, *Male Model*, *supra* note 926, pp. 109–50.

[1068] *Heather* [redacted] *Interview*, *supra* note 987, p. 58. Bruce [redacted], a prominent X-rated film producer, was quoted in the same interview as agreeing with Heather [redacted], listing only four female performers "who made anything out of it." *Id.*

[1069] New York Hearing, Vol. II, Dottie [redacted], pp. 301–03. Dottie [redacted], it should be noted, does not appear to have performed in any material depicting actual sexual conduct.

[1070] 1984 *Senate Hearing*, *supra* note 975, p. 317 (statement of Veronica [redacted]). Veronica [redacted], of course, alluded elsewhere to having suffered sexual abuse as a child.

[1071] *Richard* [redacted] *Interview*, *supra* note 986, pp. 23–24.

[1072] Bennett, *supra* note 972, p. 72.

[1073] *Id.*

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[redacted], *supra* note 1008, pp. 284–86 (discussing death of Dorothy [redacted], whose "death was a cruel blow to *Playboy*, since she was the first Playmate, of all the many Playmates, who looked as if she might become a Hollywood star. . . . One after another, the Playmates disappeared into obscurity. . . ." *Id.*, p. 286).

Personal relationships, to begin with, appear to be severely threatened by modeling in pornography. Romances as well as family ties are often strained or broken.[1074] One young man, who had been lured into making "adult" films at age seventeen, told us about his feelings after leaving modeling and entering a drug rehabilitation program:

> I don't know. I feel scared to have a sexual relationship with a girl. I don't know what it's going to be like or if I am going to be too rough.[1075]

Candida ✂, a major "star" (and now producer) in the industry, told Forum *Magazine* recently that after her marriage she had ended her performing because "once wed . . . she couldn't quite bring herself to do the sex scenes."[1076] Even that may be of little avail: as one "X" rated film producer put it, "A man getting involved with an ex-porn star will always shove it back in her face."[1077]

What relationships do continue for models are often highly negative. Thus many female models live with highly abusive husbands or boyfriends, whose relationship to them is that of pimp to prostitute.[1078] Others report suffering rape[1079] or demands that they service agents or producers.[1080] Indeed, some may drift directly into "call girl" status.[1081]

> I was never viewed as a human being . . . Most people, right off the bat, assume I am a piece of meat, a porno star, a floozie.[1082]

"Adult" publications even those which are "soft core," view models as products.[1083] In the midst of that environment a young female performer said that she "just hated [herself] every day"[1084] and a young male told us it "made me feel worthless."[1085] As Andrea Dworkin has explained, that valuation is a central element of contemporary pornographic modeling.[1086] And it is a valuation we strongly reject.

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[1074] *See, e.g.*, Los Angeles Hearing, Vol. I, Chris, pp. 93–94 (relationship with boyfriend broken); *Ginger* ✂ *Interview, supra* note 992, p. 30 (being known as porn star "stops the whole magical process" of romantic attachment, but still accepted by family); *Traci* ✂ *Interview, supra* note 1037, p. 34 ("You don't have a personal life.") *Ali* ✂, *Interview, supra* note 976, pp. 9–10 (modeling makes relationship with husband "very tough"; family members "know nothing of any porn films"); *Heather* ✂ *Interview, supra* note 987, p. 32 (modeling "destroys your sex life," and, according to Bruce ✂, porn producer, "really screws up relationships.") Los Angeles Hearing, Vol. II, Miki ✂, p. 116, (*Playboy* "Playmates" suffer alienation from family and friends). *But see*, Los Angeles Hearing, Vol. I, Mary, p. 78 (husband found "it was very hard for him to adjust . . . to me doing this . . . [and] wasn't very pleased with me," but it "hasn't really affected my married life"; "several relatives stopped speaking to me").

[1075] Washington, D.C. Hearing, Vol. II, Jeff, p. 173.

[1076] *Candida* ✂ *Interview, supra* note 978, p. 42.

[1077] *Heather* ✂ *Interview, supra* note 987, p. 58.

[1078] *Lederer Interview, supra* note 989, p. 63; *See*, Washington, D.C., Hearing, Vol. I, Sarah ✂; Washington, D.C., Vol. I, Valerie ✂; New York Hearing, Vol. I, Linda ✂. *See also*, *Heather* ✂ *Interview, supra* note 987, p. 58 ("[Erotic Film Guide]: Actor William ✂ also says that actresses seek out abusive boyfriends and husbands, the dregs of society, because they want to punish themselves. Any comment?

✂: "It's hard to find a nice man who'd want you. And I guess you figure you wouldn't deserve a nice man.")

[1079] *Lederer Interview, supra* note 989, p. 67; Los Angeles Hearing, Vol. II, Miki ✂, pp. 116, 124.

[1080] Los Angeles Hearing, Vol. I, Chris, p. 93; 1984 Senate Hearing, *supra* note 975, p. 179 (Linda ✂ statement). The "casting couch" is, unfortunately, apparently not unique to the pornography segment of the entertainment industry.

[1081] Los Angeles Hearing, Vol. II, Miki ✂, p. 117. Ms. ✂, until 1982 the director of Playmate Promotions, asserted that, among many other abuses, former Playmates "were involved in an international call girl ring with ties to the Playboy mansion." *Id.* Playboy Enterprises, in a letter from its counsel of November 6, 1985, accused her of "bearing false witness" in "efforts for self-aggrandizement," but offered no specific evidence rebutting her accusations. Until she left *Playboy*, Miki occupied a position (conceded by all sides) of responsibility and trust. Documents submitted to the Commission by Miki indicate, further that she had received outstanding ratings for performance of her duties at *Playboy*, and that at least at the time of her resignation had communicated her feelings about the treatment of the Playmates with her superiors. We are, of course, in no position to evaluate the truth of this accusation—or of the others included in her testimony—but we see no clear reason why, as *Playboy* suggests, Miki's account should be dismissed out of hand. It accords, indeed, with statements submitted by two other former Playmates (Susan ✂ and Brenda ✂), and in significant respects with a recent full scale overview by an outsider. Miller *supra* note 1006 ("Many girls drawn into this orbit found the world of *Playboy* was not a pretty place. . . .") *Id.*, p. 180. We can only urge a thorough investigation of Miki's allegations regarding problems faced by the Playmates she supervised, which included sexual exploitation and harassment, rape, murder and attempted murder.

[1082] *Interview: Linda* ✂, Adult Video News, (March 1985), p. 19.

[1083] Los Angeles Hearing, Vol. II, Miki ✂, p. 121.

[1084] *Heather* ✂ *Interview, supra* note 1051, p. 58.

[1085] Washington, D.C., Hearing, Vol. II, Jeff, p. 171.

[1086] A. Dworkin, *Pornography: Men Possessing Women* (1979) ("Contemporary pornography strictly and literally conforms to the word's root [Greek] meaning: the graphic depiction of vile whores, or, in our language, sluts, cows (as in: sexual cattle, sexual chattel). . . ." *Id.*, p. 200.

# CONCLUSIONS AND RECOMMENDATIONS

In sum, then, we have found, within the admittedly severe limitations of the evidence, the following propositions to be generally true of commercial pornography's use of performers: (1) that they are normally young, previously abused, and financially strapped; (2) that on the job they find exploitative economic arrangements, extremely poor working conditions, serious health hazards, strong temptations to drug use, and little chance of career advancement; and (3) that in their personal lives they will often suffer substantial injuries to relationships, reputation, and self-image. We acknowledge that exceptions exist to all these findings, and we concede, as well, that extremely thorough investigation might prove one or more of them untrue. Unhappily the power to conduct such an investigation is not in our hands. And the industry itself, which of course knows the full truth of the matter, has shown little interest in sharing that knowledge with us. We are, therefore, left with the unattractive but firm obligation to make recommendations in this area based on what we in our limited way have been able to uncover.

The approach we propose in this area is a cautious but urgent one. Caution we believe to be required from the incomplete character of the evidence currently available. Urgency, however, arises from the extremely serious nature of the harms apparently being inflicted on many young and vulnerable people. Both of these interests will be best served, we believe, if federal and state governments initiate thorough investigations—by agencies or committees possessed of substantial resources and full subpoena powers—of the use of "models." Those investigations should, in our view, proceed from three related, but distinct perspectives: pornographic modeling as (1) a subset of prostitution; (2) a form of sex discrimination; and (3) an invasion of performers' personal rights. Briefly we will consider the parameters of each of these perspectives and possible concrete courses of action available under each.

## MODELING AND PROSTITUTION

It seems abundantly clear from the facts before us that the bulk of commercial pornographic modeling (that is, all performances which include actual sexual intercourse), quite simply is a form of prostitution. So much was directly asserted by representatives of prostitutes' organizations who testified before us,[1087] as well as representatives of law enforcement[1088] and effectively denied by no one. Every court which has examined the questions from this standpoint has agreed, reasoning that where persons are paid to have sex it is irrelevant that the act is for display to others.[1089] As prostitution is conduct which the state has a strong interest in regulating, the First Amendment does not preclude that regulation merely because it is labelled "speech" or is filmed.[1090] It is also readily apparent that the interests which have in the past most powerfully justified the state's concern over prostitution—exploitation of the young and the weak, prevention of disease—are just as strongly implicated by pornographic "modeling."

If upon further study our equation of prostitution and "modeling" proves to be true, it is incumbent upon the federal government and the states to consider carefully how to respond. Some of our witnesses have in fact urged *legalization* of pornographic modeling, and of all prostitution, as a means of eliminating its clandestine character and allowing "sex workers" to improve the conditions under which they labor.[1091] Insofar as that proposal would permit the recruitment of men and women into prostitution, the promotion of prostitution, or the living on the avails of prostitution—all characteristics, so far as we can tell, of the producers and distributors of commercial pornography—it flies in the face of established international mores,[1092] longstanding national policy,[1093] and simple good sense.[1094] We agree with the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted by the General Assembly of the United Nations in 1949, that the State should punish any person who "procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person" or who "exploits the prostitution of another person, even with the consent of that person."[1095] Lifting sanctions against the "employer" seems no more attractive a solution with regard to exploitation in pornography than it would, for example, with regard to child or subminimum-wage labor. "Legalization," if extended to producers and others currently considered "panderers" under state laws, would only make it easier for them to persuade more vulnerable young people to participate in a world that seems to us inherently abusive.

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[1087] Los Angeles Hearing, Vol. II, Margaret Prescod, p. 215; Los Angeles Hearing, Vol. II, Priscilla Alexander, p. 224.

[1088] Los Angeles Hearing, Vol. I, James Docherty, p. 13. See also, Chicago Hearing, Vol. I, Nan Hunter ("some women work in both pornography and prostitution"; statement does not contest their overlapping character).

[1089] See, *United States v. Roeder*, 526 F.2d 726(10th Cir. 1975), cert. denied 462 U.S. 905(1976); *People v. Souter* 178 Cal. Rptr. 111(Ct. App. 2d Dist. 1981); *People ex rel. Van DeKamp v. American Art Enterprises*, 142 Cal. Rptr. 338(Ct. App. 2d Dist. 1977); *People v. Fixler*, 128 Cal. Rptr. 363 (Ct. App. 2d Dist. 1976); *People v. Kovner* 96 Misc. 2d 414 (sup. Ct. N.Y. Co. 1978). See also, *People v. Maita*, 203 Cal. Rptr. 685(Ct. App. 1st Dist. 1984) (defendant convicted of pimping for hiring women to have on-stage sex with customers in a theater).

[1090] *Id.*; See, *United States v. O'Brien*, 391 U.S., (1968), p. 367.

[1091] Los Angeles Hearing, Vol. II, Margaret Prescod, p. 215; Los Angeles Hearing, Vol. II, Priscilla Alexander, p. 224; Chicago Hearing, Vol. I, Nan Hunter.

With regard to penalties directed at models themselves, however, the argument for decriminalization seems much stronger, on several grounds. First, it is not uniform policy in the District of Columbia to make the simple act of prostitution (without accompanying "solicitation") a crime.[1096] Second, those who are misguided, desperate or frightened enough to turn to pornographic modeling are unlikely to be deterred by the relatively light sentences typically imposed on those convicted of prostitution.[1097] Third, models are often so badly harmed by their experience that the addition of criminal penalties to their suffering—which includes a never-ending fear that humiliating photographs or films will be publicly exhibited—may seem superfluous and cruel.[1098] Finally, fear of prosecution may make such models less likely to come forward and provide evidence against those who exploited them.[1099]

While we do not believe, therefore, that prostitution laws are a perfect weapon in every respect for protecting models from procurement and abuse, their application at least to producers and agents seem fully justified. The experience of Los Angeles, where pandering prosecutions and "red-light" nuisance abatement actions have been successfully brought by police and prosecutors, deserves careful study in other jurisdictions. There seems little warrant for a state or locality to tolerate the production of commercial pornography that is as exploitative as that discussed above unless its basic approach to prostitution itself is radically different from the national norm.

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[1092] *The International Convention for the Suppression of the Traffic in Women and Children. League of Nations—Treaty Series* (1922) (No. 269), adopted by twenty-eight member nations of the League of Nations in 1921, established the duty of all signatory states to punish the procuring or promoting the prostitution of any women by force, or any woman under age of twenty-one, even with her consent. *See*, V Bullough, *The History of Prostitution* 184(1964). The United States, which of course refused League membership, never acceded to the Convention. In 1949 the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Prostitution of Others, which committed signatory states to punish the procuring or the exploitation of the prostitution of another, without regard to any age limit. *Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, Economic and Social Council, United Nations* (1983), Annex VII [hereinafter, *United Nations Report*]. At present both international conventions are in effect—although not ratified by the United States and are supplemented by the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations in 1979, which also requires (in Article 6) the signatory parties to "suppress all forms of traffic in women and exploitation of prostitution of women." *Id*. Annex IX. On their face these agreements all seem fully applicable to commercial pornography.

[1093] The clearest expression of this policy is the White-Slave Traffic Act (the Mann Act), ch. 395, 36 Stat. 825 (codified as amended at 18 U.S.C. SS2421–2424) (1970 & Supp. 1985), which, *inter alia* forbids interstate transportation of women or girls for the purposes of prostitution.

[1094] For excellent discussions of the pitfalls of legalized prostitution, see, K. Barry, *Female Sexual Slavery*, (1984), pp. 128–134; C. Winick & P. Kinsie, *The Lively Commerce*, (1971), pp. 211–2432; and of course the classic work studying legalized prostitution in 19th century Europe, A. Flexner, *Prostitution in Europe* (1914). For a jolting overview of the pimp-prostitute relationship, *See*, L. Lee, *The Social World of the Female Prostitute in Los Angeles*, Ph.D. Diss. (1982).

[1095] *United Nations Report*, *supra* note 1092, at 60 (Annex VII), quoting resolution 317 (IV) adopted by United Nations on December 2, 1949.

[1096] For a listing and analysis of state laws on prostitution, *See*, Note, *Right of Privacy Challenges to Prostitution Statutes*, 58 Wash U.L.Q., (1979), pp. 439, 471–80 (four states and District of Columbia punish solicitation for prostitution but not act itself). The act of prostitution was not an offense under English common law. *Id*. at 443.

[1097] *See*, Winick & Kinsie, *supra* note 1094, pp. 218–19.

[1098] *See*, *e.g.*, Barry, *supra* note 1094, pp. 125–28, *Fraser Report*, *supra* note 936, pp. 530–37.

[1099] Of course, it is also possible that with no fear of criminal prosecution themselves, models will be impervious to police pressure to give evidence against their employers. On balance the threat of a prostitution charge—in every state no more than a misdemeanor—seems unlikely to persuade many models to betray their colleagues and thereby jeopardize their careers.

Quite apart from the use of pandering statutes, however, an approach that seems to us worthy of careful study is imposition of sanctions on any persons trafficking in products or materials which they know or have reason to know were manufactured or marketed through the use of persons engaging in prostitution.

Such legislation would parallel existing legislation which forbids trafficking in products manufactured through child labor or through certain oppressive adult labor practices.[1100] Because not directed specifically at speech,[1101] and because clearly grounded in legitimate governmental interest in controlling prostitution, it would seem likely to survive constitutional attack.[1102] Given the federal government's long commitment to use its powers to regulate interstate commerce to attack prostitution in every form, we are, indeed, somewhat surprised that such a proposal has not been seriously studied before now. Nevertheless, the idea is sufficiently novel and could affect so much commerce not directly within the purview of our charter that we merely offer it for consideration and debate.

## SEX DISCRIMINATION

Along similar lines we urge careful study by the Department of Justice of the extent to which producers of sexually-explicit photographs, films, and video tapes are acting in violation of federal civil rights laws, and in particular of Title VII of the Civil Rights Act of 1964.[1103] That law provides, in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.[1104]

This provision has been interpreted widely to protect employees from having to prostitute themselves to supervisors or submit themselves to sexual intercourse or harassment to keep their jobs.[1105] One court declared flatly, "An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."[1106]

On its face this principle would seem to make illegal the requirements that a performer engage in sexual activity as a condition of his or her employment. There are, however, two limitations on its scope that are at least arguable relevant to production of pornography. The courts have ruled that sexual demands (1) must be "unwelcome,"[1107] and (2) must include disparate treatment of the sexes.[1108] The first of these limitations does not seem a serious one: the overwhelming factor motivating the sexual conduct of pornographic models is financial need, certainly not a desire to have sex with the partner assigned to him or her for the scene.[1109] The sexual act is thus in no way "welcome" in the sense we understand the law to exempt.[1110] With regard to the "disparate treatment": requirement, we note simply that women and men are normally paid different rates in the industry for the same sex acts,[1111] and that women in mainstream pornography are expected to engage in homosexual activity while men are forbidden to.[1112]

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[1100] See, *United States v. Darby*, 312 U.S., (1914), p. 100.

[1101] A company which hired employees whose duties consisted of providing sexual services to potential clients of the firm could be subject to sanctions under such a law.

[1102] *Cf.*, *New York v. Ferber*, 458 U.S., (1982), pp. 747, 761 (advertising and selling child pornography "provide an economic motive for and are thus an integral part of the production of such material, an activity illegal throughout the nation. It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. *Giboney v. Empire Storage 7 Ice Co.*, 336 U.S., (1949), pp. 490, 498."); *Wirtz v. Keystone Readers Service, Inc.* 282 F. Supp., (S.D. Fla. 1968), p. 971 (magazine subscription service violated federal law prohibiting illegal labor practices by employing high school student at below minimum wage).

[1103] 42 U.S.C. S2000(e).

[1104] 42 U.S.C. S2000 (e)-2(a)(1).

[1105] See, *Hensen v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Service Electric & Gas*, 568 F.2d 983 (D.C. Cir. 1979); 29 C.F.R. S1064(1)(a).

[1106] *Hensen*, *supra* note 1194, 682 F.2d p. 908.

[1107] *Id.*, p. 904.

[1108] *Id.*, pp. 904, 905.

[1109] *See*, Text to notes 984–991, *supra*.

[1110] Thus Hensen defined "conduct" as "unwelcome" if "the employee did not solicit or incite it" and "regarded the conduct as undesirable or offensive." 682 F.2d p. 903. Model Ali 96 is a vivid example of an employee finding such

We therefore believe it likely that much of the commercial production of pornography runs afoul of Title VII, even considering the techical limitations on its reach. Further, we believe that Title VII embodies a principle that should not be strangled by technicalities: no one in this country should have to engage in actual sex to get or keep his or her job.[1113] To the extent that Title VII and comparable state statutes do not currently reflect that principle, we urge serious and rapid consideration of proposals to broaden their reach.

## INVASION OF PERSONAL RIGHTS

During the course of our review of the position of performers in pornography, we have encountered evidence that they suffer physical coercion, damage to health, serious economic exploitation, and virtually complete loss of reputation. The pornography which they helped create will live on to plague them long after they have extricated themselves from modeling. Its effects subject performers to long-term effects potentially worse than any other form of sexual abuse, a fact noted tellingly by Dr. Ulrich Schoettle in the context of child pornography.

> Pornography is a graphic form of exhibitionism. Unlike prostitution where a degree of "privacy" exists during the sexual acts, pornography literally makes the child's body "available" for anyone willing to pay the price anywhere in the world.

The "privacy interests" of performers in pornography seem to us real and compelling[1114] while the value of the material itself is often indisputably minimal.

It, therefore, seems important for judges and lawmakers to carefully consider how performers may be protected from the unsavory characters who exploit them, and in particular what civil and equitable remedies performers may have in court. There has been disagreement in what we have heard over the current status of the law in this regard;[1115] we know only that they have been exceedingly rare.[1116] If new remedies are needed, as we are inclined to think they are, they should be framed in ways to encourage plaintiffs to come forward: perhaps by providing for treble damages in certain types of cases (such as coercion or fraud) and reasonable attorneys' fees.[1117]

We hope, too, that in studying the availability and desirability of such private remedies, courts and legislatures will be sensitive to the issue of "consent." Because of their youth, their economic desperation, and their troubled backgrounds, we submit that few performers are fully able to appreciate the meaning and the magnitude of their decision to engage in sexual performances—and throw away all control of the resulting material for the rest of their lives. Just as it is appropriate to provide consumers with extensive government protections against the consequences of their ignorance, so every adult needs special safeguards against making a decision which even the pornography industry's strongest booster admits "will haunt her the rest of her life."[1118]

Otherwise she may find that photography's freedom from time and space, so heartily welcomed by Bazin, has become her dungeon.

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[1111] Los Angeles Hearing, Vol. I, William Roberts, p. 65.

[1112] In "gay" pornography, of course, women are excluded altogether. *Id.*

[1113] We emphasize "actual," for the simulated sexual activity regularly engaged in by legitimate actors in their roles does not provoke the same concerns as actual sex. Simulated sexual conduct does not impinge on personal privacy to so enormous a degree; it risks no transmission of venereal disease; it risks no pregnancy; and, finally, it carries no comparable stigma. For a comparison of sex modeling and legitimate acting, see, text to notes 1043–1059, supra.

[1114] *Cf. New York v. Ferber*, 458 U.S. p. 759 n. 10.

[1115] *Compare*, *1984 Senate Hearing*, *supra* note 975, p. 249 (statement of Catherine MacKinnon) (Statutes of limitations, single-publication rules, and other technical limitations make actions by performers impractical at present), *with* Washington, D.C., Hearing, Vol. I, Barry Lynn, pp. 24–25 (such actions are not unknown)

[1116] The cases cited in notes 960–963, *supra* are the only ones we have been able to uncover in this area.

[1117] S. 1187, introduced last year by Senator Arlen Specter, essentially contains both these provisions—treble damages and attorney's fees—in seeking to help adult pornography victims obtain compensation for production or distribution of material in which they were coerced or fraudulently induced to appear. We note that consitutional issues may arise if equitable remedies are not carefully tailored to the First Amendment requirements, and that scienter is likely to be of some constitutional relevance in determining how wide the net of liability may be cast.

[1118] Bennett, *supra* note 972, p. 72.

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conduct "unwelcome": "I'm not going to say all that stuff about how I love to f..k on camera. . . . I guess I really don't like the sex much." Ali [illegible] Interview, *supra* note 976, p. 9.

# EXHIBIT D

# TESTIMONY OF VICTIMS

# Final Report of the
# Attorney General's Commission on PORNOGRAPHY

Introduction by
Michael J. McManus

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# CHAPTER • 16

# Victim Testimony

## INTRODUCTION

Women, men, and children who believe they have been harmed by pornography described adverse physical and psychological effects in their public testimony before the Commission and other bodies and in accounts given in writing or in interviews by Commission staff. The Commission heard testimony from thirty witnesses who reported that they or others with whom they had special relationships had been harmed in some manner by or as a result of pornography. More than one hundred persons were interviewed by Commission staff investigators, who were law enforcement personnel with considerable experience in dealing with trauma victims. Although in many instances, facts related by the person interviewed could be verified by reference to treatment records, court records, or law enforcement files, in other instances no independent verification was possible. In addition to the foregoing, a number of other statements were received in letters from persons who reported pornography-related victimization and in exhibits filed by witnesses from hearings before other fact finders, including city councils, courts of record, and the United States Senate. Some of these individuals reported an extensive series of traumatic events in their lives, making it difficult to assess the relationship, if any, between pornography and their suffering.

Witnesses attributed to pornography their having been coerced into pornographic performances, bound and beaten in direct imitation of pornography, and forcibly imprisoned for the purpose of manufacturing pornography. Although this Commission can neither conclusively determine that pornography caused these physical harms nor conclusively determine that it did not, it was the opinion of the witnesses that pornography played a central role in the pattern of abuse within which they were harmed.

Witnesses attributed many different kinds of damage to psychological functioning and sense of self to their having been used in the production of pornographic materials, exposed to pornographic materials, or sexually assaulted by offenders who used pornography as part of the abuse. Many of these psychological injuries correspond to the signs and symptoms of post-traumatic stress disorder.[762] Witnesses also attributed to pornography financial losses due to hospitalization and therapy, damage to family relationships and status in the community caused by defamatory representations in pornography, associations between prostitution and pornography, and sexual harassment through pornography. Many of the women, men, and children who testified reported each of these types of consequences, and some individuals are quoted repeatedly in various sections of this chapter.

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[762] "The essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of human experience. The characteristic symptoms involve reexperiencing the traumatic event: numbing of responsiveness to, or deduced involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder* (3d ed. 1980), p. 236 .

Although we have tried in this chapter to allow victims to speak in their own words, without interpretation or commentary, we have in several instances quoted the words of victim's mothers, friends, or therapists. We have done so only because there are instances in which the victims themselves were unavailable for testimony. In the same vein, we quote here pertinent excerpts from the eloquent testimony of Andrea Dworkin on behalf of other victims whose voices were not heard:

> My name is Andrea Dworkin. I am a citizen of the United States, and in this country where I live, every year millions of pictures are being made of women with our legs spread. We are called beaver, we are called pussy, our genitals are tied up, they are pasted, makeup is put on them to make them pop out of a page at a male viewer. Millions and millions of pictures are made of us in postures of submission and sexual access so that our vaginas are exposed for penetration, our anuses are exposed for penetration, our throats are used as if they are genitals for penetration. In this country where I live as a citizen real rapes are on film and are being sold in the marketplace. And the major motif of pornography as a form of entertainment is that women are raped and violated and humiliated until we discover that we like it and at that point we ask for more.
>
> In this country where I live as a citizen, women are penetrated by animals and objects for public entertainment, women are urinated on and defecated on, women and girls are used interchangeably so that grown women are made up to look like five- or six-year-old children surrounded by toys, presented in mainstream pornographic publications for anal penetration. There are magazines in which adult women are presented with their pubic areas shaved so that they resemble children.
>
> In this country where I live, there is a trafficking in pornography that exploits mentally and physically disabled women, women who are maimed; there is amputee pornography, a trade in women who have been maimed in that way, as if that is a sexual fetish for men. In this country where I live, there is a trade in racism as a form of sexual pleasure, so that the plantation is presented as a form of sexual gratification for the black woman slave who asks please to be abused, please to be raped, please to be hurt. Black skin is presented as if it is a female genital, and all the violence and the abuse and the humiliation that is in general directed against female genitals is directed against the black skin of women in pornography.
>
> Asian women in this country where I live are tied from trees and hung from ceilings and hung from doorways as a form of public entertainment. There is a concentration camp pornography in this country where I live, where the concentration camp and the atrocities that occurred there are presented as existing for the sexual pleasure of the victim, of the woman, who orgasms to the real abuses that occurred, not very long ago in history.
>
> In the country where I live as a citizen, there is a pornography of the humiliation of women where every single way of humiliating a human being is taken to be a form of sexual pleasure for the viewer and for the victim; where women are covered in filth, including feces, including mud, including paint, including blood, including semen; where women are tortured for the sexual pleasure of those who watch and those who do the torture, where women are murdered for the sexual pleasure of murdering women, and this material exists because it is fun, because it is entertainment, because it is a form of pleasure, and there are those who say it is a form of freedom.
>
> Certainly it is freedom for those who do it. Certainly it is freedom for those who use it as entertainment, but we are also asked to believe that it is freedom for those to whom it is done.
>
> Then this entertainment is taken, and it is used on other women, women who aren't in the pornography, to force those women into prostitution, to make them imitate the acts in the pornography. The women in the pornography, sixty-five to seventy percent of them we believe are victims of incest or child sexual abuse. They are poor women; they are not women who have opportunities in this society. They are frequently runaways who are picked up by pimps and exploited. They are frequently raped, the rapes are filmed, they are kept in prostitution by blackmail. The pornography is used on prostitutes by johns who are expected to replicate the sexual acts in the pornography, no matter how damaging it is.
>
> Pornography is used in rape—to plan it, to execute it, to choreograph it, to engender the excitement to commit the act. Pornography is used in gang rape against women. We see an increase since the release of "Deep Throat" in throat rape—where women show up in emergency rooms because men believe they can penetrate, deep-thrust, to the bottom of a woman's throat. We see increasing use of all elements of pornography in battery, which is the most commonly committed violent crime in this country, including the rape of women by animals, including maiming, including heavy bondage, including outright torture.

We have seen in the last eight years, an increase in the use of cameras in rapes. And those rapes are filmed and then they are put on the marketplace and they are protected speech—they are real rapes. We see pornography in the harassment of women on jobs, especially in nontraditional jobs, in the harassment of women in education, to create terror and compliance in the home, which as you know is the most dangerous place for women in this society, where more violence is committed against women than anywhere else. We see pornography used to create harassment of women and children in neighborhoods that are saturated with pornography, where people come from other parts of the city and then prey on the populations of people who live in those neighborhoods, and that increases physical attack and verbal assault.

We see pornography having introduced a profit motive into rape. We see that filmed rapes are protected speech. We see the centrality of pornography in serial murders. There *are* snuff films. We see boys imitating pornography.

We see the average age of rapists going down. We are beginning to see gang rapes in elementary schools committed by elementary school age boys imitating pornography. We see sexual assault after death where frequently the pornography is the motive for the murder because the man believes that he will get a particular kind of sexual pleasure having sex with a woman after she is dead.

We see a major trade in women, we see the torture of women as a form of entertainment, and we see women also suffering the injury of objectification—that is to say we are dehumanized. We are treated as if we are subhuman, and that is a precondition for violence against us.

I live in a country where if you film any act of humiliation or torture, and if the victim is a woman, the film is both entertainment and it is protected speech. Now that tells me something about what it means to be a woman citizen in this country, and the meaning of being second-class.

When your rape is entertainment, your worthlessness is absolute. You have reached the nadir of social worthlessness. The civil impact of pornography on women is staggering. It keeps us socially silent, it keeps us socially compliant, it keeps us afraid in neighborhoods; and it creates a vast hopelessness for women, a vast despair. One lives inside a nightmare of sexual abuse that is both actual and potential, and you have the great joy of knowing that your nightmare is someone else's freedom and someone else's fun.

. . . The first thing I am going to ask you to do is listen to women who want to talk to you about what has happened to them. Please listen to them. They know, they know how this works . . . . It has happened to them.

I am also asking you to acknowledge the international reality of this—this is a human rights issue—for a very personal reason, which is that my grandparents came here, Jews fleeing from Russia, Jews fleeing from Hungary. Those who did not come to this country were all killed, either in pogroms or by the Nazis. They came here for me. I live here, and I live in a country where women are tortured as a form of public entertainment and for profit, and that torture is upheld as a state-protected right. Now, that is unbearable.

I am asking you to help the exploited, not the exploiters. You have a tremendous opportunity here. I am asking you as individuals to have the courage, because I think it's what you will need, to actually be willing yourselves to go and cut that woman down and untie her hands and take the gag out of her mouth, and to do something, for her freedom."[763]

# ADVERSE EFFECTS

## PHYSICAL HARM

### RAPE

The Commission received testimony alleging rapes related to pornography. For example, a woman reported that her daughter was forced to engage in sexual acts in the making of pornographic materials.

My daughter attended [a] Pre-school in . . . California. She was three years old when she began attending. During the six months she attended before the school closed, she was sexually molested on multiple occasions, by teachers on the school grounds and also was taken off school property to unknown locations to be molested by persons unknown to me. Photographs were taken on many (if not

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[763] New York Hearing, Vol. II, Andrea Dworkin, pp. 129-51.

> all) of these occasions. She was threatened with physical violence with a knife and a gun and was forced to watch animals being killed."[764]

A man who claimed he had participated in over one hundred pornographic films in two and a half years testified:

> I have seen it totally destroy too many lives, but mostly the girls'. It's a lot harder on young ladies. I have seen a lot of producers and directors and photographers, just to get out a product that they have in mind, either badger or almost force the girls into doing things that they would really rather not do. I, myself, have been on a couple of sets where the young ladies have been forced to do even anal sex scenes with a guy which is rather large and I have seen them crying in pain and just totally destroys their personality when they are forced to do things like that.[765]

Other rapes were allegedly stimulated by the viewing of pornography or modeled after particular pornographic materials.

A mother left her ten-year-old daughter for two hours with a very close friend who lived next door. The friend had the girl watch pornographic movies on the Playboy TV channel and then engaged in oral sex with her.[766]

In testimony before another body, one woman reported:

> Over a period of eighteen years the woman was regularly raped by this man. He would bring pornographic magazines, books, and paraphernalia into the bedroom with him and tell her that if she did not perform the sexual acts that were being done in the "dirty" books and magazines he would beat and kill her. I know about this because my bedroom was right next to hers. I could hear everything they said. I could hear her screams and cries. In addition, since I did most of the cleaning in the house, I would often come across the books, magazines, and paraphernalia that were in the bedroom and other rooms of the house. The magazines had pictures of mostly women and children and some men. Eventually, the woman admitted to me that her ex-husband did in fact use pornographic materials to terrorize and rape her.[767]

Another woman wrote:

> When I first met my husband, it was in early 1975, and he was all the time talking about Ms. film, *Deep Throat*. After we were married, he on several occasions referred to her performances and suggested I try to imitate her actions . . . . Last January . . . my husband raped me . . . . He made me strip and lie on our bed. He cut our clothesline up . . . and tied my hands and feet to the four corners of the bedframe. (All this was done while our nine month old son watched.) While he held a butcher knife on me threatening to kill me he fed me three strong tranquilizers. I started crying and because the baby got scared and also began crying, he beat my face and my body. I later had welts and bruises. He attempted to smother me with a pillow . . . . Then he had sex with me vaginally, and then forced me to give oral sex to him.[768]

Another woman alleged that her father had used *Playboy* in connection with his molestation of her when she was a small child:

> . . . This father took a *Playboy* magazine and wrote her name across the centerfold. Then he placed it under the covers so she would find it when she went to bed. He joined her in bed that night and taught her about sex.

According to another source:

> A five-year-old child told her foster mother, "We have movies at home. Daddy shows them when mother is gone. The people do not wear clothes, and Daddy and I take our clothes off and do the same thing the people in the movies do."[769]

Women who had been asked if they had ever been upset by anyone trying to get them to do what they'd seen in pornographic pictures, movies or books, described the following examples:

> *Miss D:* I was staying at this guy's house. He tried to make me have oral sex with him. He said he'd seen far-out stuff in movies, and that it would be fun to mentally and physically torture a woman.

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[764] Miami Hearings, Vol. II, p. 285B.

[765] Los Angeles Hearing, Vol. I, p. 81.

[766] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

[767] Minneapolis City Council, Session II, (Dec. 1983), p. 14.

[768] Anonymous letter to the Pornography Resource Center forwarded to the Attorney General's Commission on Pornography.

[769] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

> Miss G: He forced me to have oral sex with him when I had no desire to do it.
>
> Miss M: Anal sex. First he attempted gentle persuasion. I guess. He was somebody I'd been dating a while and we'd gone to bed a few times. Once he tried to persuade [me] to go along with anal sex, first verbally, then by touching me. When I said, "no," he did it anyway—much to my pain. It hurt like hell."[770]

One rape victim said that her assailants had attacked her after perusing pornographic magazines:

> The third man forced his penis into my mouth and told me to do it and I didn't know how to do it. I did not know what I was supposed to be doing. He started swearing at me and calling me a bitch and a slut and that I better do it right and that I wasn't even trying. Then he started getting very angry and one of men pulled the trigger in his gun so I tried harder.
>
> Then when he had an erection, he raped me. They continued to make jokes about how lucky they were to have found me when they did and they made jokes about me being a virgin. They started kicking leaves and pine needles on me and kicking me and told me that if I wanted more, that I could come back the next day.
>
> Then they started walking away and I put my clothes back on and it was not far from where they had set up their camp and I looked down and saw that they had been reading pornographic magazines. They were magazines with nude women on the covers."[771]

Elsewhere a gang rape was attributed to imitation of a specific piece of pornography:

> A gang rape of a juvenile girl [was committed] by six adolescent boys who used a pornographic magazine's pictorial and editorial layout to recreate a rape in the woods outside of their housing development."[772]

Another victim of sexual assault during childhood attributed her assailant's behavior to the instruction of pornography:

> What this game consisted of was each child going into a tool shed with this guy. When my turn came I didn't want to go in because I was scared, it was dark in there and it was dirty. There were cobwebs and there was this giant pitchfork.
>
> One of the kids pushed me inside and shut the door. Then this boy grabbed me and pulled down my shorts and sexually abused me. In short, he finger-fucked me and he made me masturbate him. I was really terrified. I thought I was in hell, and I was also in a lot of pain. I started crying really hard and he finally let me go, but I was told that if I told anyone I wouldn't be believed, that it was all my fault and that I would be punished. He also told me that he would hurt me again if I told anyone. His sister told me that this game he had learned from his dirty books. I knew that he had these dirty books because I had seen him with them."[773]

Another witness testified that pornography had been used by a man who had sexually abused her in childhood:

> A lot of raping went on in the basement. That is also where the pornography books were. They were magazines that were brought of hiding, out of boxes that were on the top of shelves.
>
> When [he] and I got to the top of the stairs I knew I was going to pay for my little arrangement. He ordered me to take my clothing off and he tried to rape me. He was too big and I was too small. He forced me to go down on him . . . ."[774]

Other witnesses testified that men had required of them particular acts that had been seen in pornography:

> While imitating the women in the magazines was one result of the material. I have always felt that another consequence was the initiation of oral sex into the abuse. This did not occur until after the pornographic material arrived and I firmly believe that the idea came from the pornographic magazines.
>
> Pornography did not cause the incestuous relationship with my older brother but I have always felt that its use contributed to the different types of abuse that was used."[775]

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[770] Minneapolis City Council. Session I. (Dec. 1983), pp. 65, 67. (Testimony based on Diana Russell's research)

[771] Minneapolis City Council. Session II. (Dec. 1983), p. 42.

[772] Pornography Speech presented to the National Women Judges Conference. October 12, 1986, submitted to the Attorney General's Commission on Pornography.

[773] Minneapolis City Council. Session II. (Dec. 1983), pp. 48–49.

[774] Washington, D.C., Hearing, Vol. I, p. 222.

[775] Chicago Hearing, Vol. II, p. 291B.

Another woman described the same phenomenon within her marriage:

> I had not realized the extent of the harm that pornography had done to me until a year and a half ago when I was working on a photo montage of the kinds of pornography for an educational forum. I came across a picture of a position that my ex-husband had insisted we try. When we did, I found the position painful, yet he was determined that we have intercourse that way. I hemorrhaged for three days. I finally went to my doctor and I recall the shame I felt as I explained to him what had caused the bleeding.
>
> Once we saw an X-rated film that showed anal intercourse. After that he insisted that I try anal intercourse. I agreed to do so, trying to be the available, willing creature that I thought I was supposed to be. I found the experience very painful, and I told him so. But he kept insisting that we try it again and again.[776]

According to a former *Playboy* bunny:

> A Playmate of the Year, also on the Woman to Woman Show, testified that a man attempted to rape her after he recognized her from the magazine.
>
> I experienced everything from date rape to physical abuse, to group sex and finally to fantasizing homosexuality as I read *Playboy* magazines. The group sex held in Hefner's mansion was accompanied by the pornographic movie, *The Devil in Miss Jones* . . .[777]

A woman who said that both of her husbands had subjected her to sexual and other physical abuse testified,

> Often he would be high on drugs or alcohol and force me to do violent sexual acts while he was leafing through the pictures.[778]

Testifying before another body, one woman described forced sexual activity during the screening of pornographic films:

> . . . comments like "That's how real men do it," instructing the handicapped men, teasing them that if they watched enough of these movies they would be able to perform normally. There were constant remarks made about what normal male sexual experience was. Then the disabled men were undressed by the able men and the woman was forced to engage sexually with the disabled men. there were two weapons in the room. The woman refused and she was forced, held down by the physically able men. Everyone watched and the movies kept going.
>
> After this, the able-bodied men said they were going to show the handicapped men how "real men" do it. They forced the woman to enact simultaneously with the movie. In the movie at this point a group of men were urinating on a naked woman. All the men in the room were able to perform this task, so they all started urinating on the woman who was now naked. Then the able-bodied men had sex with the woman while the disabled men watched.[779]

### Forced Sexual Performance

During the course of the hearings the Commission received reports from individuals who described situations in which they were forced to engage in certain sexual acts. These acts are distinct from and in addition to those acts described as rape above. As with the acts of rape which were described to the Commission, acts of forced sexual performance included those done in the course of making pornographic material and those relating to the use of existing pornography. Examples of the first of these are abundant:

> A mother and father in ✂ forced their four daughters, ages ten to seventeen, to engage in family sex while pornographic pictures were being filmed. This mother also drove the girls to dates with men where she would watch while the girls had sex, then she would collect fees of thirty to fifty dollars.[780]

A woman who had been forced into prostitution and participating in the filming of pornography testified:

> He had video equipment in his home long before it was mass-produced. Every time my pimp sent me to him he would take pornographic pictures of me and a second woman. He also made video tapes of the sex that took place under his direction. This continued on the average of once a week for about a year.

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[776] Chicago Hearing, Vol. II, p. 241F3.
[777] Chicago Hearing, Vol. I, pp. 314, 316.
[778] Washington, D.C., Hearing, Vol. I, p. 125.
[779] Minneapolis City Council, Session II, (Dec. 1983), p. 72.
[780] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

> There was an apartment that I was sent to often. There were usually two to three men there. After I had sex with them, they would take pictures of me in various pornographic poses. When I was a young girl I didn't have the vocabulary to call them pornographers. I used to refer to them as "the photographers."
>
> On another occasion another young girl and myself were taken to an apartment in to meet some men. We were told that they were gangsters and that we should be nice to them. When we arrived we were taken into a room that had a large bed at its center surrounded by lighting and film equipment. We were told to act out a "lesbian scene." After about fifteen minutes we were told to get dressed, that they couldn't use us. We were returned to [our city] unpaid. Again, it was only in retrospect as an adult that I realized I had been used in a commercial pornographic film loop.[781]

Another woman wrote:

> My father was my pimp in pornography. There were three occasions, from ages nine to sixteen, when he forced me to be a pornography model. This was in the 1950s and 1960s. . . . I don't know if the pictures and films are still being distributed.[782]

A sixteen-year-old girl who had been molested by two family friends from age seven to age twelve testified:

> Viewing the pictures in the magazine seemed to click something for him, for he then wanted his own personal record of all that he had taught me.
>
> He whipped out his Polaroid camera, which was in his briefcase, and then he proceeded to take pictures of me in these various positions, which included using the vibrator.[783]

Another woman described her discomfort in trying to pose as demanded of her:

> So I told him that I would try. The first few attempts I failed, he was very disappointed. I failed under the weight and under the heat of the plaster. He wanted me to be in poses where I had to hold my hands up over my head and they would be numb and they would fall. He eventually tied my hands over my head. Finally he succeeded, he ended up getting a plaster cast of my body.
>
> . . . He told me to take off my clothes and to pose in various positions, either draped over the corroded, rusty seats or in positions where I acted as if I was running towards the door. And then he asked me to put my body in contorted different positions, draped down the stairs of the bus, and they were quite jagged, and at that moment I realized that we were depicting a murder. I became very terrified and scared and I was really cold. I told him I didn't want to do this and that I wanted to go home and that I was really scared.
>
> While we were doing this, I would like to backtrack for a minute. I wasn't achieving the right facial expressions for the pictures so he started telling me stories that depicted pursuits during rape so that I would have the right expressions on my face like the women in the magazines. I remember being very distant from him and just wanting to get home. I remember being very scared.[784]

In these instances in which forced sexual performances were said to be modeled after pornography, the individuals stated that they were shown various pornographic materials and forced to recreate the activities depicted. In some cases the imitation required of victims was highly specific, as in the following example:

> My father had an easel that he put by the bed. He'd pin a picture on the easel and like a teacher he would tell me this is what you're going to learn today. He would then act out the picture on me.[785]

Another woman wrote:

> I was sexually abused by my foster father from the time I was seven until I was thirteen. He had stacks and stacks of *Playboys*. He would take me to his bedroom or his workshop, show me the pictures, and say, "This is what big girls do. If you want to be a big girl, you have to do this, but you can never tell anybody." Then I would have to pose like the women in the pictures. I also remember being shown a *Playboy* cartoon off a man having sex with a child.[786]

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[781] Washington, D.C., Hearing, Vol. I, p. 180.

[782] Brief of Women Against Pornography submitted to the Attorney General's Commission on Pornography.

[783] Miami Hearing, Vol. II, pp. 20–21.

[784] Minneapolis, Session, II, (Dec. 1983), pp. 59–60.

[785] Chicago Hearing, Vol. II, p. 95.

[786] Anonymous letter to Women Against Pornography, submitted to the Attorney General's Commission on Pornography (Aug. 1984).

A mother described her discovery of her daughter's abuse:

> My daughter explained that the adults would come into the room and announce that [it] was time for a "movie" or a "bath" and then begin to usher the children . . . into the den or the bathroom. When my daughter refused to undress one of the mothers removed my daughter's clothing with hand movement over her entire body. My daughter was seldom allowed to go home until she had at least one bath with one or more children. Upon hearing this I called the mother and gave her emphatic instructions that my daughter was not to take "baths" at her house. One such occasion after that my daughter came home with obvious dried tears on her face. I feared something dreadful had happened."[787]

> They confirmed my fear and discovered even more horror. She had been not only sexually abused but over one thousand pornographic photographs were seized in a search of their apartment spanning a period of over two years. My daughter was only twelve years old at the time of the phone call. She had broken up over the events of the previous week."[788]

One woman who was asked if she had ever been upset by anyone trying to get her to do what they'd seen in pornographic pictures, movies or books said:

> This guy had seen a movie where a woman was being made love to by dogs. He suggested that some of his friends had a dog and we should have a party and set the dog loose on the women. He wanted me to put a muzzle on the dog and put some sort of stuff on my vagina so that the dog would lick there."[789]

A woman who had been forced into prostitution and participation in the production of pornography testified:

> They knew a child's face when they looked into it. It was clear that I was not acting of my own free will. I was always covered with welts and bruises. They found this very distasteful and admonished me about it. It was even clearer that I was sexually inexperienced. I literally didn't know what to do. So they showed me pornography to teach me about sex and then they would ignore my tears as they positioned my body like the women in the pictures and used me.

> My pimp also made me work "stag" parties. These parties were attended by an average of ten to twenty men. These parties took place in catering halls, bars and union halls. I was also forced to work conventions. These were weekend affairs held at major hotels in New York attended by hundreds of professional men. The series of events was the same. Pornographic films followed by myself and other women having sex with the men. The films that were shown most often set the tone for the kinds of acts we were expected to perform.

> My last pimp was a pornographer and the most brutal of all. He owned, on the average, three women and girls at any given time. There was always pornography in our apartment. Every night he would set up the projector and run a series of stag films. When he was sufficiently aroused he would choose one of us for sex. The sex that happened always duplicated the pornography. He used it to teach us how to service him. In retrospect the only sex I knew until I was well into my twenties was coercive sex taught to me through pictures of women coerced into pornographic performances."[790]

A sixteen-year-old girl testified:

> At about age eleven and a half he started using the magazine again. In these magazines there were pictures of one woman masturbating another woman, two men and a woman having sex, oral, anal, and vaginal sex. It was with these magazines that we started having me act out positions with him."[791]

The mother of two girls testified:

> [My daughters] also had an experience with an eleven-year-old neighbor boy. . . . Porno pictures that [he] had were shown to the girls and to the other children on the block. Later that day, [he] invited [my daughters] into his house to play video games, but then tried to imitate the sex acts in the photos with [my] eleven year old [daughter] as his partner; [my other daughter] witnessed the incident."[792]

A woman testified that her husband de-

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787. Houston Hearing, Vol. II, p. 178D3.
788. Houston Hearing, Vol. II, Anonymous, p. 178Q2.
789. Minneapolis City Council, Session I, (Dec. 1983), p. 67 (Testimony based on Diana Russell's research).
790. Washington, D.C., Hearing, Vol. I, pp. 179–82.
791. Miami Hearing, Vol. II, p. 21.
792. Washington, D.C., Hearing, Vol. I, p. 128.

manded that she enact behaviors he had found appealing in pornography:

> . . . I was coerced into acting out certain sexual fantasies which he had, many times from reading pornographic literature or viewing certain pornographic movies.[793]

Another woman described her father's use of pornography to encourage and legitimize incest:

> He encouraged me by showing me pornographic magazines which they kept in the bathroom and told me it was not wrong because they were doing it in the magazines and that made it o.k. He told me all fathers do it to their daughters and said even pastors do it to their daughters. The magazines were to help me learn more about sex.[794]

Another woman described the same phenomenon:

> The incest started at the age of eight. I did not understand any of it and did not feel that it was right. My dad would try to convince me that it was o.k. He would find magazines with articles and/or pictures that would show fathers and daughters and/or mothers, brothers and sisters having sexual intercourse. (Mostly fathers and daughters.) He would say that if it was published in magazines that it had to be all right because magazines could not publish lies.
>
> He would show me these magazines and tell me to look at them or read them and I would turn my head and say no. He would leave them with me and tell me to look later. I was afraid not to look or read them because I did not know what he would do. He would ask me later if I had read them and what they said or if I looked real close at the pictures. He would say, "See it's okay to do because it's published in magazines."[795]

**Battery, Torture**

Witnesses who appeared before the Commission and those who submitted statements reported acts of battery and episodes of torture associated with the production or use of pornography. Individuals described acts of battery or torture inflicted upon them during the course of producing pornographic materials. For example, a woman who reported having been sexually abused since infancy said:

> That night that I was filmed for a pornographic movie, my stepfather tortured me both physically and sexually because I did not perform adequately enough to be convincing.[796]

A young man who had been the victim of a "sex ring" testified:

> I became involved in bondage. I was shown pornography and was bound in various ways and photographed.[797]

Linda [redacted] testified:

> When I decided to head back north and informed Mr. [redacted] of my intention, that was when I met the real Mr. [redacted] and my two and a half years of imprisonment began. He began a complete turnaround and beat me up physically and began the mental abuse, from that day forward my hell began.
>
> During the filming of *Deep Throat*, actually after the first day, I suffered a brutal beating in my room for smiling on the set. It was a hotel room and the whole crew was in one room, there was at least twenty people partying, music going, laughing, and having a good time. Mr. [redacted] started to bounce me off the walls. I figured out of twenty people, there might be one human being that would do something to help me and I was screaming for help, I was being beaten, I was being kicked around and again bounced off of walls. And all of a sudden the room next door became very quiet. Nobody, not one person, came to help me.[798]

One witness before the Commission described how women and young girls were tortured and suffered permanent physical injuries to answer publisher demands for photographs depicting sado-masochistic abuse. When the torturer/photographer inquired of the publisher as to the types of depictions that would sell, the torturer/photographer was instructed to get similar existing publications and use the depictions therein for instruction. The torturer/photographer followed the publisher's instructions, tortured women and girls accordingly, and then sold the photographs to the publisher. The photographs were included in magazines sold nationally in pornographic outlets."[799]

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[793] Chicago Hearing, Vol. I, pp. 23–26.

[794] Anonymous letter to the Attorney General's Commission on Pornography.

[795] Letter to the Attorney General's Commission on Pornography.

[796] Washington, D.C., Hearing, Vol. II, p. 262.

[797] Washington, D.C., Vol. II, p. 49.

[798] Public Hearings before Minneapolis City Council, Session I, (Dec. 1983), pp. 47–49.

The Commission also had received several accounts from individuals who described the use of pornography in the course of physical abuse, and who attributed the type and forms of abuse to specific pornographic materials. For example, one woman who reported having been sexually abused by her father from the age of three testified that he would:

> . . . hang me upside down in a closet and push objects like screwdrivers or table knives inside me. Sometimes he would heat them first. All the while he would have me perform oral sex on him. He would look at his porno pictures almost every day, using them to get ideas of what to do to me or my siblings.[800]

Testifying before another body, another woman said:

> He would read from the pornography like a textbook, like a journal. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots and how to bind me in a way that I couldn't get out.[801]

A former prostitute testified before another body:

> The man returned with two other men. They burned her with cigarettes and attached nipple clips to her breasts. They had many S and M magazines with them and showed her many pictures of women appearing to consent, enjoy, and encourage this abuse. She was held for twelve hours, continuously raped and beaten. She was paid fifty dollars, or about $2.33 per hour.[802]

Another woman wrote:

> . . . solid charges . . . could be brought forth. Amongst these charges would be sexual deviance due to repeated inflictions of sadomasochistic acts. I was also told I would be entitled to an annulment as the marriage remained unconsummated throughout.
>
> . . . While doing household chores, I found very pornographic materials which illustrated sadist techniques and answered my questions as to where my husband got these bizarre ideas.[803]

A former prostitute testified:

> He stripped me, tied me up, spread-eagled on the bed so that I could not move and the began to caress me very gently. Then, when he thought that I was relaxed, he squeezed my nipple really hard. I did not react. He held up a porn magazine with a picture of a beaten woman and said, "I want you to look like that. I want you to hurt." He then began beating me, and when I didn't cry fast enough, he lit a cigarette and held it right above my breast for a long time before he burned me.[804]

Another woman testified before another body:

> During the time that I was held captive by that man, I was physically and psychologically abused by him. I was whipped with belts and electrical cords. I was beat with pieces of wood. I was usually forced to pull my pants down before I was to be beaten. I was touched and grabbed where I did not want him to touch me. I was also locked into dark closets and the basement for many hours at a time and I was often not allowed to speak or cry.
>
> The things that this man did to me were also done to the children of the woman, except that they suffered from even worse abuse. I believe that part of the psychological abuse I suffered from was from the pornographic materials that the man used in his terrorization of us. I knew that if he wanted to, he could do more of the things that were being done in those magazines to me. When he looked at the magazines, he could make hateful obscene, violent remarks about women in general and about me. I was told that because I am female I am here to be used and abused by him and that because he is male he is the master and I am his slave.[805]

A women's shelter wrote to the Commission:

> One woman known to us related that her spouse always had a number of pornographic magazines around the house. The final epi-

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799. Los Angeles Hearing, Vol. II, p. 65, 77. One such publication was purchased in Washington, D.C.
800. Chicago Hearing, Vol. II, p. 95.
801. Minneapolis City Council Hearings Session II, (Dec. 1983), p. 68.
802. Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 73.
803. Letter to the Attorney General's Commission on Pornography.
804. Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 77.
805. Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), pp. 15-16.

> sode that resulted in ending their marriage was his acting out a scene from one of the magazines. She was forcibly stripped, bound and gagged. And with help from her husband, she was raped by a German shepherd. His second wife became known to us when she sought out support because of the magazines and bondage equipment she discovered in their home.
>
> *Penthouse* and *Hustler* were always a part of the literature in the third woman's home. Occasionally, her spouse would add *Cheri*, *Oui*, *Swedish Erotica* to the collection. His favorite form of abuse was bondage. He enjoyed playing what he called a "game" of whipping and slavery. She knows that what he did to her was directly related to articles about bondage and sex [slaves] which he read. He wanted to involve a second woman, her friend, in the scenarios.[806]

A mother of two girls testified:

> [My husband] had a large collection of bizarre S&M and bondage pornography that he kept in the nightstand drawer in our bedroom. One one occasion [he] tied me to our bed and sodomized me. This occurred after I refused to agree to be bound and tied as the models appeared in some of [his] pornographic magazines.
>
> Also, the girls told me that [he] sometimes played a game with them in which their feet were tied up tightly with a rope. The molestation included "bed touching" and exhibitionism by [him], but did not involve actual penetration.[807]

In testifying before another body, one man said:

> I understand pornography to be a force in creating violence in the gay community. I was battered by my ex-lover who used pornography. The pornography, straight and gay, I had been exposed to, helped convince me that I had to accept his violence and helped keep me in that destructive relationship.
>
> Then one time, he branded me. I still have a scar on my butt. He put a little wax initial thing on a hot plate and then stuck it on my ass when I was unaware.[808]

Women who were asked in a research project if they had ever been upset by anyone trying to get them to do what they'd seen in pornographic pictures, movies or books described experiences similar to those reported by Commission witnesses:

> Miss F: He'd read something in a pornographic book, and then he wanted to live it out. It was too violent for me to do something like that. It was basically getting dressed up and spanking. Him spanking me. I refused to do it.
>
> Miss I: It was S&M stuff. I was asked if I would participate in being beaten up. It was a proposition, it never happened. I didn't like the idea of it.
>
> Miss P: My boyfriend and I saw a movie in which there was masochism. After that he wanted to gag me and tie me up. He was stoned, I was not. I was really shocked at his behavior. I was nervous and uptight. He literally tried to force me, after gagging me first. He snuck up behind me with a scarf. He was hurting me with it and I started getting upset. Then I realized it wasn't a joke. He grabbed me and shook me by my shoulders and brought out some ropes, and told me to relax, and that I would enjoy it. Then he started putting me down about my feelings about sex, and my inhibitedness. I started crying and struggling with him, got loose, and kicked him in the testicles, which forced him down on the couch. I ran out of the house. Next day he called and apologized, but that was the end of him.[809]

A woman whose father had sexually abused her from age three testified:

> I have had my hands tied, my feet tied, my mouth taped to teach me big girls don't cry. He would tell me I was very fortunate to have a father that would teach me the facts of life. Many of the pictures he had were of women in bondage, with their hands tied, feet tied and their mouth taped.[810]

In testimony before another body, a woman said:

> I was hit and punched because I refused to al-

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[806] Letter from Donna Dunn's Women's Shelter, Rochester, to the Attorney General's Commission on Pornography.

[807] Washington, D.C., Hearing, Vol. I, pp. 126–27.

[808] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 57.

[809] Public Hearings before Minneapolis City Council, Session I, (Dec. 1983), pp. 65, 66 (Testimony based on Diana Russell's research).

[810] Chicago Hearing, Vol. II, pp. 95–96.

> low my partner to put his fist in my vagina in the same fashion as in one of his pornography magazines.[811]

Another woman, testifying before the Commission, reported:

> . . . a trick first showed me how to do bondage and discipline acts. I had numerous customers who would have pornographic material with them. I was asked to shave my pubic hairs because it reminded them of a child or engage in specific sex acts they had seen in a magazine. Having me urinate on them, commonly referred to as golden showers, was a popular request.
>
> Again my customers, who were mostly professional types, would bring many examples in magazines or books of the types of bondage they wanted or of other acts they thought would satisfy their sexual desires, like me acting like their mother, enemas, spanking or cross dressing (men dressing in women's undergarments or clothing). I would also get couples (a man and woman) who were into bondage and discipline, with me as the instructor and ultra dominatrix. My customers would want me to dress like women in the magazines or to bind them in some specific way. Urinating on my customer was also not uncommon.[812]

**Murder**

In addition to the physical harms already mentioned, some evidence was received alleging a connection between murder and pornographic materials. Cases were reported to the Commission in which a murder may have been patterned after a depiction found in a pornographic magazine or film. For example, the *New York Times* reported:

> The December 1984 issue of Penthouse carried this eroticized torture into the 'men's entertainment' forum with a series of photographs of Asian women bound with heavy rope, hung from trees, and sectioned into parts. It is not known whether this pictorial incited a crime that occurred two months later wherein an eight year old Chinese girl living in Chapel Hill, North Carolina, was kidnaped, raped, murdered and left hanging from a tree limb.[813]

Witnesses also described the influence they perceived pornography had in their criminal activities or the crimes others had committed:

> The day came when I invited a small neighborhood boy into my apartment, molested him and then killed him in fear of being caught. Over the next few years I kidnapped, sexually abused and murdered four other boys.
>
> Pornography wasn't the only negative influence in my life, but its effect on me was devastating. I lost all sense of decency and respect for humanity and life.[814]

**Imprisonment**

The Commission received testimony and other evidence from individuals who reported that they had been kidnapped or held captive during the production of pornographic materials. For example, the woman who appeared in *Deep Throat* testified:

> My name today is Linda [redacted]. Linda Lovelace was the name I bore during a two and a half year period of imprisonment. For those of you who don't know the name, Linda Lovelace was the victim of this so-called victimless crime. Used and abused by Mr. [redacted], her captor, she was forced through physical, mental, and sexual abuse and often at gunpoint and threats of her life to be involved with pornography.
>
> I literally became a prisoner. I was not allowed out of his sight, not even to use the bathroom. Why, you may ask? Because there was a window in the bathroom.[815]
>
> Well, at night what he would do is put his body over my body so that if I did try to get up he would wake up. And he was a very light sleeper. If I did attempt to move or roll over in my sleep he would awaken.[816]

A women's shelter wrote:

> In another case, a woman was imprisoned in the house by her husband. He had a video cassette recorder. He would bring home pornographic movies, tie her to a chair and force her

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[811] Testimony before Minneapolis City Council on June 7, 1984, submitted to the Attorney General's Commission on Pornography.

[812] Washington, D.C., Hearing, Vol. II, p. 312A-1.

[813] N.Y. Times, Feb. 4, 1985.

[814] Anonymous letter to the Attorney General's Commission on Pornography.

[815] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), pp. 45, 46, 47.

[816] Public Hearings before Minneapolis City Council, Session I, (Dec. 1983), p. 56.

> to act out what they were seeing on the screen. She was severely injured and came to our Shelter.[817]

### Sexually Transmitted Diseases

Witnesses reported various injuries and diseases associated with the production of pornography.[818] The diseases which were reported included a variety of sexually transmitted diseases. For example, a citizen's group wrote to the Commission:

> How does a three and a half year old girl learn to cope with gonorrhea of the throat and a painful vagina, stretched many times its normal size because her father used her for sexual gratification. This father was another pornography addict.[819]

A former *Playboy* bunny testified:

> I heard a bunny I knew had her reproductive organs removed due to a venereal disease left untreated.[820]

A man who had participated in the production of more than one hundred pornographic films testified:

> I decided to get out of the business because I was kind of scared about all the different diseases and stuff going on. I myself was pretty lucky to only have got gonorrhea a couple of times. I never caught herpes or nothing like that. But it was scary. The diseases are really rampant out there, and especially with the AIDS scare. You have one person that has AIDS in the industry and within six months you can really infect about half the industry because there's so much contact; you have so many different jobs, different people, each month.[821]

A woman testified:

> There seemed to be a lot of venereal diseases and other contact diseases going around and I was afraid of catching something.[822]

### Masochistic Self-Harm

One person described her son's use of pornography and his resulting death.[823]

> My son, Troy [redacted], was murdered on August 6, 1981, by the greed and avarice of the publishers of [redacted] Magazine. My son read the article 'Orgasm of Death,' set up the sexual experiment depicted therein, followed the explicit instructions of the article, and ended up dead. He would still be alive today were he not enticed and incited into this action by [redacted] Magazine's 'How To Do' August 1981 article; an article which was found at his feet and which directly caused his death.[824]

A woman testified about her husband, who was a medical professional and an avid consumer of pornography:

> . . . extremely excited about was the story of a man who had fish in an aquarium, stuck his organ in the aquarium and they nibbled on it until he orgasmed. John was so excited that he would go out and buy a fish tank. At that time John was physically abusing me by pulling my hair, slapping me, kicking me, stomping on my feet.[825]

### Prostitution

Witnesses who testified before the Commission and individuals who submitted statements reported several connections between pornography and prostitution. One such connection was the use of pornography as instructional manuals for prostitutes.

For example, a former prostitute testified:

> One of the very first commonalities we discovered as a group, we were all introduced to prostitution through pornography; there were no exceptions in our group, and we were all under eighteen.
>
> Pornography was our textbook, we learned the tricks of the trade by men exposing us to por-

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[817] Letter from Harriet Tubman Women's Shelter to the Attorney General's Commission on Pornography.

[818] See, *Chapter 17* in this Part for a further discussion of the injuries and diseases performers in the pornography industry encounter.

[819] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography.

[820] Chicago Hearing, Vol. I, p. 317.

[821] Los Angeles Hearing, Vol. I, p. 82.

[822] Washington, D.C., Hearing, Vol. I, p. 82.

[823] Commercial "erotica" was found at the death scene of forty-four out of 150 accidental autoerotic deaths in the largest study of this subject. R. R. Hazelwood, P. E. Dietz & A. W. Burgess, *Autoerotic Fatalities* 130–131 (1983).

[824] Houston Hearing, Vol. II, p. 178H1; *Herceg et. al. v.* [redacted] *Magazine, Inc.*, C.A. no. H-82-198, S.D. Texas (1985) (case now on appeal).

[825] Washington, D.C., Hearing, Vol. I, p. 81.

> nography and us trying to mimic what we saw. I could not stress enough what a huge influence we feel this was.[826]

Another connection was the use of pornographic films by pimps to blackmail the participants:

> I was the main woman of a pimp who filmed sexual acts almost every night in our home. The dope man, who supplied us with cocaine for free in exchange for these arranged orgies, was a really freaky man who would do anything. They arranged to have women, who I assumed were forced to be there, have sex with dogs and filmed those acts. There were stacks of films all over the house, which my pimp used to blackmail people with.[827]

Yet another connection was the use of magazines to stimulate the clientele:

> When I worked at massage studios, the owners had subscriptions to *Playboy, Penthouse, Penthouse Forum* and the like. These magazines were arranged in the waiting area of most of the massage places which I worked in. If a girl was not inside with a trick, she was expected to sit out front with the men who were waiting or who were undecided and to look at the magazines with them in order to get them titillated. They used the soft porn to help them work up the courage to try the acts described in the magazine with the prostitutes at the massage studio.[828]

## PSYCHOLOGICAL HARM

### Suicidal Thoughts and Behavior[829]

The Commission received testimony from many individuals who reported suicidal thoughts and behavior. These individuals described experiences related to pornographic materials that led them to feel worthless and hopeless, which in turn led to thoughts of suicide or attempts. For example, the mother of an adolescent girl who said she had been molested through the use of pornography testified:

> This is not accomplished overnight, nor is it ever undone. She is now sixteen. She tried to commit suicide at the age of thirteen and a half as her only means of escape. She spent five months in an adolescent psychiatric unit and nineteen months at a residential care facility for twenty-four hour round-the-clock help with her problems. The brunt of the expenses for her care were our responsibility, reaching close to $100,000.[830]

Another witness testified:

> By age fourteen, I had attempted suicide three times and had been in three different mental hospitals. Never had I revealed to anyone my childhood nightmare. Finally, in an effort to revive our sex life, we began to use pornography. This had a devastating effect on our lives. I began to become very depressed and suicidal again. Though we did become more sexually active, the quality of our relationship deteriorated almost to the point of divorce. Pornography again had touched my life in a very destructive way.[831]

A former *Playboy* bunny testified:

> I was extremely suicidal and sought psychiatric help for the eight years I lived in a sexually promiscuous fashion.
>
> In Los Angeles, my roommate, who was a bunny, had slashed her wrists because she was so suicidal.
>
> Although I received small parts in *Godfather II* and *Funny Lady*, had sex with movie stars and producers, I felt worthless and empty. Out of my despair I attempted suicide on numerous occasions.[832]

Other individuals reported suicidal thoughts and behaviors as a result of being forced to participate in the production or use of pornography. For example, a teenage boy who had run away from home reported having been sexually abused by his uncle. He stated he was shown pornographic materials in the course of sexual abuse and he was used in the production of pornographic films:

> He told me they were for him and his friends to view . . . It was a difficult situation for me.

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[826] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 70.

[827] *Id.*, p. 79.

[828] *Id.*, p. 77.

[829] In some instances the symptoms described may be characteristic of mood disorders. See, *DSM-III, supra* note 762, pp. 205–224.

[830] Miami Hearing, Vol. II, pp. 33–34.

[831] Houston Hearing, Vol. II, p. 187R2.

[832] Chicago Hearing, Vol. I, pp. 313–14.

> And afterwards. I attempted suicide several times.[833]

A woman reported experiences:

> . . . which I found very humiliating and very destructive to my self-esteem and my feeling of self-worth as a person. To prevent these I agreed with him to act out in privacy a lot of those scenarios that he read to me. A lot of them depicting bondage and different sexual acts that I found very humiliating. About this time when things were getting really terrible and I was feeling very suicidal and very worthless as a person, at that time any dreams that I had of a career in medicine were just totally washed away. I could not think of myself any more as a human being.[834]

A woman who testified that her former husband of eleven years was an avid consumer of pornography and had attempted to force her to view pornographic materials testified:

> . . . [I] was very suicidal throughout my marriage; attempted several times.[835]

### Fear and Anxiety Caused by Seeing Pornography

The Commission heard testimony from several witnesses who described fear and anxiety associated with being shown pornography. The anxieties which have been described may be divided into two primary categories: anxiety attributable to memories of prior abuse which are relived through the images portrayed in the pornography being shown; and an overall embarrassment or discomfort in being made to view pornographic materials.

One witness reported being forced by her father to view pornographic materials during the course of an incestuous relationship:

> . . . and of course he had booked a double room. He had all kinds of things in his briefcase, and he pulled out a magazine or book and told me to read it. He sat on the bed and watched me and his facial expression frightened me: I did not want to read it. I did not want to look at those pictures. . . . I was emotionally tortured and I didn't know what to do. I did not like my body or my father's body and having to look at those pornographic pictures forced me to visually memorize painful incidents with my father.[836]

Another witness described similar feelings of anxiety and fear of being shown pornography during the course of sexual abuse in her childhood, beginning when she was ten:

> . . . I have no memory of there being any pornography in the bungalow where we lived. All nine kids slept in one room. My stepfather had his own room. My mother slept on the couch in the living room. The pornography was at the store. The pornography was also in the garage where Carl had some kind of office. He was involved in some kind of activity that needed to be hidden. I have no idea what that was. I remember the pictures on the wall and I remember boxes of books again. These were books I didn't want to look at. Carl's apartment is the place where I remember he made the pornography of me.[837]
>
> As they would show me this pornography, I would look at the pictures and then I would feel real scared. . . .[838]

Other women have described their feelings about pornography and the pain it recreated from a previous abusive experience. One woman appearing before the Minneapolis City Council reported that she currently experiences anxiety upon viewing pornography because it reawakens the experience of sexual abuse she had earlier suffered:

> Two days later, having failed my attempts to keep those images away from me, I was sexually abused in my family. I don't know if the man that abused me uses pornography but looking at the women in those pictures, I saw myself at fourteen, at fifteen, at sixteen. I felt the weight of that man's body, the pain, the disgust. . . . I don't need studies and statistics to tell me that there is a relationship between pornography and real violence against women. My body remembers.[839]

Parents also reported children's lasting fears after abuse. The mother of a girl who re-

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833. Washington, D.C., Hearing, Vol. I, p. 48.
834. Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 64.
835. Houston Hearing, Vol. I, p. 61.
836. Washington, D.C., Hearing, Vol. II, pp. 132–33.
837. Washington, D.C., Hearing, Vol. I, p. 223.
838. Id., p. 224.
839. Public Hearings before Minneapolis City Council Session II, (Dec. 1983), p. 112.

portedly was molested and used in the production of pornography in a ✂ pre-school testified:

> She has also talked about a lot of lights. big strong lights. and she is also very fearful of having her picture taken. My sister was visiting from overseas and tried to take her picture and she hid under the bed.[840]

The second category of fear and anxiety was described primarily by adult women who during the course of an intimate relationship were forced to view pornography by a spouse or close friend. These women described feelings of embarrassment. disgust. and public humiliation.

> My husband is very knowledgeable about the Marquis de Sade. He was raised by prostitutes. One of his stepfathers had what he called the largest pornography collection he had ever seen. There was pornographic art throughout his stepfather's home. One evening when we went to visit his mother and his stepfather. the evening's entertainment consisted of getting together with the neighbors and their children and watching a pornography film involving sex with children. I got up. left the room to throw up; and my husband came over to tell me that I had embarrassed him.[841]

Other witnesses described feelings of humiliation at being forced to view pornography and being subject to ridicule when they demonstrated a reluctance to participate. For example:

> We would meet together as a group at pornographic adult theaters or live sex shows. Initially I started arguing that the women on stage looked very devastated like they were disgusted and hated it. I felt devastated and disgusted watching it. I was told by those men if I wasn't as smart as I was and if I would be more sexually liberated and more sexy. that I would get along a lot better in the world and they and a lot of other men would like me more. About this time I started feeling very terrified.[842]

The Commission heard testimony from several women whose husbands requested they accompany them to view pornography. These women reported feelings of embarrassment and humiliation as well as a deterioration of the marital relationship:

> I went with him once. I was disgusted with what I saw. I was also very embarrassed to have been seen in the theater. He continued going by himself and probably never missed a new showing.[843]

Another woman testified:

> He would take me to the pornography stores here in Houston with the intention of going to get a newspaper or going to get a Better Homes and Gardens. Before I knew it. he would kind of lead me back into the second part of the store. I think that only happened twice because I would get so upset and traumatized . . . .[844]

Yet another woman experienced fear and anxiety when she listened to Dial-A-Porn messages that her son had been calling:

> The chilling horror I felt in my kitchen after my first encounter with Dial-A-Porn lingers with me today. After my initial reaction of disbelief subsided. I was overcome with grief. I cried uncontrollably for myself. my son . . . .[845]

### Feelings of Shame and Guilt[846]

The Commission heard testimony from many witnesses who described feelings of worthlessness. guilt. and shame which they attributed to experiences involving pornographic materials.

> As an adolescent. I was sexually molested in my own home by a family member who regularly used pornographic materials. I have been threatened at knifepoint by a stranger in an attempted rape. I have been physically and verbally harassed on the street. in other public places. and over the telephone at all hours of the night. I have experienced and continue to experience the humiliation. degradation. and shame that these acts were meant to instill in me.

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[840] Miami Hearing. Vol. I. p. 101.
[841] Houston Hearing. Vol. I. p. 62.
[842] Public Hearings before Minneapolis City Council. Session II. (Dec. 12. 1983). p. 62.
[843] Chicago Hearing. Vol. I. pp. 153-54.
[844] Houston Hearing. Vol. I. p. 58.
[845] Los Angeles Hearing. Vol. I. p. 265.
[846] These symptoms may be reflective of Post-traumatic Stress Disorder. See. *DSM-III*. supra note 782. p. 238.

> This connection became clear to me when I saw a documentary about pornography called *Not a Love Story*. I realized that I was any one of the women in the film, at least in the eyes of those men who have abused me. I saw myself through the abusers' eyes and I felt dirty and disgusting, like a piece of meat. It was the same shame and humiliation as in the other experiences.[847]

The Commission also heard testimony from people who experienced feelings of guilt and shame when shown pornography:

> It was important to me to try and stop the feelings of embarrassment because then I thought that they would not be able to see my shame. Somehow I thought they watched me, waited to see my reaction to the pornography and then they would continue holding it up in front of me to make me squirm. I felt humiliated and hollow.[848]

Guilt and shame were also reported by witnesses as feelings associated with the production of pornography. For example, a young man who was used in the production of pornography as an adolescent testified:

> A couple of months later I went into the Straight program, and I talked about it a couple of times, why I would do it. Take her money and go down to buy cocaine with it. I just felt it really disgusted me and I shamed myself.[849]

A statement submitted to the Commission by the National Conference of Judges discussed the feelings of guilt and shame that victims experience because of the production and use of homemade pornography:

> . . . collections of self-made pornography detailing who their victims were and the acts they committed. This is a particularly traumatic issue for many of the victims that we treat. It is a source of extreme shame and embarrassment for the victims that pictures of the activity between them and the offender exist. We may not have all those pictures, copies of the pictures may have been sold or traded to other collectors, and we may not have found the entire collection. These collections are catalogued at the Bureau of Criminal Apprehension and continue to exist long past the time when the crime has been reported. . . .
>
> In many of our incest families, the perpetrators use pornography as tools or guides in order to initiate their family members into sexual behavior. Manuals and books that speak of father-daughter love, father-son sex, or family love have been used to rationalize and validate this kind of behavior.
>
> Many of our child molesters, both juvenile and adults, have utilized both adult and child pornography as a way to initiate their victims into the sexual behavior as well as a tool or guide for the sexual behavior of child molesting. Many of our victims blame themselves and feel a great deal of culpability because they believed the original depiction from pornography as being normal behavior between adults and children.[850]

In a letter presented to the Minneapolis City Council, a woman described her public embarrassment and shame at seeing what seemed to be a photograph of herself:

> It was a full-length figure, naked except for high-heeled shoes and stockings, taking off a shirt. Never in my life had I posed for any photograph, drawing or painting remotely similar to this image. The people giving me this laughed, thought it was funny, thought I would find it funny and truly meant no harm—they are all talented, intelligent, nice people, an indication of the extent of the pornographic mind-set we all suffer under. I felt upset, ripped-off, diminished, insulted, abused, hurt, furious and powerless. All of which I concealed from my friends by smiling and saying, "Where did you get this?" (For the moment I thought they had it made up by the art department at the studio.) "From a magazine" was the answer. Added to the aforementioned reactions was horror! I thought, "This has been published! It is publicly available for anyone to see and assume I may have posed for it."
>
> I curtailed my honest reaction because in a few minutes we would all have to begin filming our show—which we did. They, thinking it had been a fun joke, me in a great deal of pain and distress.[851]

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[847] Public Hearings before Minneapolis City Council, Session III, (Dec. 1983), p. 126.
[848] Washington, D.C., Hearing, Vol. I, p. 225.
[849] Washington, D.C., Hearing, Vol. I, p. 170.
[850] National Conference of Judges, October 12, 1986.
[851] Public Hearings before Minneapolis City Council, Session III, (Dec. 1983), p. 4.

### Fear of Exposure through Publication or Display of Pornographic Materials

Some witnesses feared the future dissemination of pornography which had been made of them. For example, a woman who had been forced to participate in the filming of pornography testified:

> But there still exists the pornography that was made of me. I know the men who made it. I know where they are, and there is nothing I can do about it. I live knowing that at any time it could surface and could be used to humiliate me and my family. I know that it can be used to ruin my professional life in the future. I know because some of it was produced within months before my eighteenth birthday that it is protected under current law.[852]

Linda ✂ , who appeared in the film *Deep Throat* as Linda Lovelace, testified:

> I have a son who will be ten in April. My daughter Lindsay will be six on the 4th of July. There are times when my phone rings and it's just obscene phone calls and people saying the typical kind of degradation they say on the telephone. And it's hard because, how do you say to these people, come on, you are hurting my six- and my nine-year-old children. That hurts and it does hurt that the film is still being shown.
>
> I mean, we have a video store in our town, and we have a VCR, and I will not go into that store and get my tapes. I will go to the next town to get them. I just don't feel that store should have that film in the town that I live, but there is nothing I can do about it.
>
> I have no rights as a victim. The only right I have is to be able to tell my story and hope that someone listens.[853]

The young man who had been sexually abused by his uncle and used in the production of pornography testified:

> The sexual abuse that was afflicted on me lowered my self-esteem and the films reminded me of that. I was afraid that this would be shown to the world.[854]

A woman who reported that she was forced into prostitution at age thirteen after running away from a sexually abusive home testified that she was forced to participate in the production of pornographic films and tapes:

> It was clear to me that in the years I was in prostitution that all of the women I met were systematically coerced into prostitution and pornography in the same way a prisoner of war is systematically imprisoned, tortured and starved into compliance by his captors. The difference is that prisoners of war are not held responsible for coerced statements and acts but when a girl or woman is coerced in this very manner into prostitution and for use in pornography, she is held responsible.
>
> This pimp made pornography of all of us. He also made tape recordings of us having sex with him and recordings of our screams and pleading when he gave us brutal beatings. It was not unusual for him to threaten us with death. He would later use these recordings to humiliate us by playing them for his friends in our presence, for his own sexual arousal, and to terrorize us and other women he brought home.[855]

According to the submission on behalf of the National Judges Conference, the continuing existence of pornography impedes treatment of victims:

> The therapeutic issue for the victim to complete treatment is the need to put the crime in the past, an impossibility when there is an existing pictorial history.[856]

### Amnesia and Denial and Repression of Abuse[857]

The Commission heard accounts from several witnesses who were unable to recall portions of their lives or specific events. These witnesses attributed their amnesia to trauma associated with the production or use of pornography. The woman who had been sexually abused and forced to participate in the production and viewing of pornography from age ten testified:

> I do not remember the exact beginning of my personal war.[858]

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[852] Washington, D.C., Hearing, Vol. I, p. 189.

[853] New York Hearing, Vol. I, pp. 54–55.

[854] Washington, D.C., Hearing, Vol. I, p. 49.

[855] Washington, D.C., Hearing, Vol. II, p. 183.

[856] National Judges Conference, October 12, 1986.

[857] These symptoms may be reflective of Post-traumatic Stress Disorder (PTSD). See, DSM-III, supra note 782, p. 238.

[858] Washington, D.C., Hearing, Vol. I, p. 220.

> In 1984 is when I started to speak publicly against pornography because it was during that year that I learned and remembered that I was victimized as a child. Prior to that time I had no memory of it.[859]

> My upset has to do with not being able to remember exactly the beginning, or for that matter, the lost segments of time such as a year or two of my life.[860]

> It is essential, if one is to survive years of physical abuse, whether one is a child or an adult, to distort one's reality and live in denial.[861]

Witnesses described various psychological mechanisms they used to endure the sexual abuse or humiliation associated with pornography:

> Sometimes I would make believe I was in a coma and I'd have to lay absolutely still, because people in comas don't move. So I would set about my task by practicing how not to move and how not to make a sound.[862]

> . . . and because of what my family life was like, I learned to cope with being shown pornography.

> The way I did that was I would behave as if I was looking at the pictures. But I would not directly look at them. I would make believe that I was blind, that I could not see. In my mind I said to myself, I do not see them, but then concentrated on not allowing my body to respond in any way that would be visible to them. I repeated to myself over and over again, don't move any part of your body. Somehow I believed if I denied the feelings that I could forget the experience, which I later translated to it never happened, and I had stayed that way for twenty years.[863]

A woman who said she had been sexually and emotionally abused since childhood through the use of pornography and who said she suffered from multiple personality testified:

> In every episode with him are ones I realized that I could not avoid his advances: I would put myself in a trance-like state and pray for it all to be over with as soon as possible.[864]

> . . . Then, like an internal sore, the repressed memories began erupting, baring all of my symptoms and anxiety; I looked for the long-term help that I knew I would need.[865]

> . . . It has been extremely difficult for me to write my testimony. I am only now, because of the request that I testify today, beginning to remember the pornography to which I was subjected. The memories that I have relived completely have been of a physical nature, the extreme traumas which were responsible for my splitting. I feel that I have been so desensitized that the memories of having been shown pornographic pictures have seemed harmless and therefore, until now, there has been no need to remember them.

* *

> . . . trauma of my relationship with my stepfather, and the role pornography played. Each time I have reread what I have written I am so re-appalled, re-horrified and re-traumatized myself that I decided it more important to just tell you that I knew pornographic magazines played a large part in my stepfather's life. I do not remember in detail the magazines he used, but I do know that they were of a sadomasochistic nature.[866]

**Nightmares**[867]

The mother of an adolescent girl who said she had been sexually abused through the use of pornography testified that her daughter had recurrent nightmares of the abuse:

> He used this magazine to get her to do the same type of thing to him and as a tool to instruct her as to how he wanted her to pose for his nude photographs. To this day, she has nightmares and is continually remembering additional details of his assaults.[868]

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859. *Id.*, p. 219.
860. *Id.*, p. 220.
861. *Id.*, p. 231.
862. *Id.*, p. 230.
863. *Id.*, p. 224.
864. Washington, D.C., Hearing, Vol. II, p. 262.
865. *Id.*, p. 264.
866. *Id.*, p. 258–59.
867. This symptom may be reflective of Post-traumatic Stress Disorder. *DSM-III*, *supra* note 762, p. 238.
868. Miami Hearings, Vol. II, p. 32.

### Compulsive Reenactment of Sexual Abuse and Inability to Feel Sexual Pleasure Outside of a Context of Dominance and Submission[869]

Many witnesses described an inability to engage in healthy sexual relationships, including reports of a seeming need for abuse or unhealthy dominance. One woman whose husband was an avid consumer of pornography testified:

> This obsession and addiction did not enrich our sex life. It robbed me of a loving relationship, and our sex life turned to his masturbating with his pornography.[870]

Another witness testified:

> My unhealthy concept of sex began when I was a child between the ages of seven and nine. At that time I was introduced to both pictorial and written pornography. This was over fifty-five years ago. My entire concept of what sex was all about came from these materials.[871]

A woman who had been forced to participate in the production and viewing of pornography testified:

> So at night in order to go to sleep I would act out scenes in my head of being tortured and I had to practice how to endure extreme pain. This is how I put myself to sleep at nights as a child. As an adult, instead of having to imagine these scenes, John acted out his violent sado-masochistic fantasies on my body.[872]

* * *

> I lived with [a man]. One day he told me he had fantasies; fantasies of tying up a woman and using whips. I told him I had the same fantasies. In fact I have been having those fantasies since I was at least twelve or thirteen years old. One of the ways I would put myself to sleep at night as a child was I would run skits through my head and the main character I would act out was me. I was always being hurt.[873]

A former *Playboy* bunny testified:

> My first association with *Playboy* began in childhood when I found *Playboy* as well as other pornographic magazines hidden around the house. I have since discovered that a great deal of pornography ends up in the hands of the children. This gave me a distorted image of sexuality. Pornography portrays sex as impersonal and insatiable.[874]

### Inability to Experience Sexual Pleasure and Feelings of Sexual Inadequacy

A woman whose father had used pornography in his sexual abuse of her from the age of three testified:

> I was nothing but a pornographic tool for his use. I cannot distinguish the difference between sex and pornography. Because of my sexual abuse as a child I am extremely against pornography, and because of pornography I cannot enjoy sex.[875]

Other witnesses attributed feelings of sexual insecurity and inadequacy to experiences with pornography. For example, a woman whose husband attempted to force her to view pornography testified:

> It was at that point, early in our relationship, that I began to think that there was something wrong with me. After all, if I loved this person, why didn't I share his enthusiasm?[876]

Another woman who said her husband had sexually abused her through the use of pornography testified:

> I thought that I was either a frigid, uncaring wife, but that's the idea; I have received messages from my husband.[877]

Another woman whose husband was an avid consumer of pornography testified:

> It finally progressed to the desire for exchanging parties and sex orgies with many partners. He again told me there was something wrong with me because I would not share him with others and I did not enjoy sex.[878]

* * *

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[869] These described symptoms may be characteristic of Post-traumatic Stress Disorder and Sexual Masochism. See. DSM-III, *supra* note 782, pp. 238, 274.

[870] Chicago Hearing, Vol. I, p. 154.

[871] Houston Hearing, Vol. II, p. 178BB1.

[872] Washington, D.C., Hearing, Vol. I, p. 230.

[873] *Id.*, pp. 229–30.

[874] Chicago Hearing, Vol. I, p. 312.

[875] Chicago Hearing, Vol. II, p. 98.

[876] Houston Hearing, Vol. I, pp. 58–59.

[877] Chicago Hearing, Vol. I, p. 24.

[878] Chicago Hearing, Vol. I, p. 154.

> I can still remember when I told him I still loved him and I would not divorce him if he would change. He said I was sexually cold and selfish . . . .[879]
>
> He was convinced there was something wrong with me because I could no longer respond to him. In fact, I felt very uncomfortable whenever he touched me. He continually told me I was cold, even though he had nothing to offer me. And I believe this was justifying his involvement with pornography.[880]

### Feelings of Inferiority and Degradation

Some individuals described situations in which pornography had been used to instill feelings of racial inferiority. For example, one women testified before another body:

> In thinking about coming here today to speak, I realized that my life would be in danger. As a woman of color these dangers seem many and great, an absolute loss of credibility and respect, wrath and disgust, potential violence both verbal and physical, and ridicule and harassment to name a few. I also realized the dangers to my life if I did not come. These dangers being complacency, letting go of my rage and terror about pornography and its impact on my life, accepting that the shame is mine, accepting that I am the slut and the whore that deserved what was done to me, believing that I am usable. I have no illusions about men not seeing me as a slut, they do.[881]

Witnesses also described the pornography was used to degrade them as women. For example, a woman whose husband used pornography to abuse her testified:

> As a result of this I developed a very low self-esteem. I felt emotionally isolated because of the fear and embarrassment.[882]

Another woman said:

> He showed me art books and also books, magazines of pornography. And as he was showing me these works, he was doing a critique of women's bodies, of their facial expression, of parts of their bodies and of their dress. Following this was a critique of my too athletic, too muscular body. I was seventeen, it was very devastating to me that my body was being torn apart in this way.[883]

Another woman testified:

> Once he insisted that we go see an X-rated movie at a theater that showed pornography exclusively. I remember feeling humiliated and frightened being the only woman in the room while the men around me sat masturbating openly. I kept my eyes glued to the top of the screen and prayed for it to be over soon. When we got home, he demanded sex.[884]

A witness who appeared before the Minneapolis City Council described feelings of inferiority and inadequacy:

> When we arrived, he informed me that the other men at the party were envious that he had a girl friend to fuck. They wanted to fuck too after watching the pornography. He informed me of this as he was taking his coat off.
>
> He then took off the rest of his clothes and had me perform fellatio on him. I did not do this of my own volition. He put his genitals in my face and he said, "Take it all." Then he fucked me on the couch in the living room, all this took about five minutes. And when he was finished he dressed and went back to the party. I felt ashamed and numb and I also felt very used.
>
> This encounter differed from others previous, it was much quicker, it was somewhat rougher, and he was not aware of me as a person. There was no foreplay. It is my opinion that his viewing of the pornography served as foreplay for him.
>
> * * *
>
> . . . this usual treatment did result in feelings of low self-esteem, depression, confusion and a lot of shame.[885]

The Commission received reports from individuals who described feelings of exploitation through a partner's use of pornography in an intimate relationship:

> He was a lover. He'd go to porno movies, then he'd come home and say, I saw this in a movie.

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[879] Id., pp. 157.
[880] Id., pp. 154.
[881] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 47.
[882] Chicago Hearing, Vol. I, p. 25.
[883] Public Hearings before Minneapolis City Council Session II, (Dec. 1983), p. 58.
[884] Washington, D.C., Hearing, Vol. I, p. 186.
[885] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), pp. 54–55.

> Let's try it. I felt really exploited, like I was being put in a mold.[886]

A young man who had been forced to engage in sexual acts for the production of pornography testified that he and other boys who had been exploited by a sex ring felt stigmatized by the publicity surrounding the investigation and prosecution of the offenders:

> Those of us who were involved in the ring never talked about it. We wanted to forget the experience. But since my name became public I couldn't escape the stigma of being involved in the . . . sex scandal. I started taking drugs heavily at age twelve to try to cope with the situation.[887]

A woman who had herself been forced into prostitution and the production of pornography testified:

> My first husband was always withdrawn and had very little self-esteem. He was a sad young man. People often felt sorry for him. He died before his twenty-fifth birthday in a drunken car accident. Just a few months ago I learned something that helped explain his low self-esteem, his alcoholism, and his avid consumption of pornography. I saw a picture of him as an adolescent in a child pornography photograph in a Women Against Pornography display.[888]

**Feelings of Frustrations with the Legal System**

The Commission heard testimony describing feelings of frustration and problems with the legal system. Some of the witnesses described helplessness and frustration which they thought could have been alleviated if they had been provided guidance in seeking legal redress. For example, one woman wrote:

> Please, please, use their experience and knowledge and work with them. They have tried to get legislation passed against the evils of pornography, for instance the Minneapolis ordinance. . . . Lastly, there are many women's organizations which have been working hard against the evils of the ever-growing, and increasingly more violent pornography which is making our society even more sick.[889]

Linda [redacted] testified:

> . . . At a grand jury hearing in California after they had watched a porno film, they asked me why I did it. I said, "Because a gun was being pointed at me" and they just said, "Oh, but no charges were ever filed." I also called the Beverly Hills Police Department on my final escape and told them that Mr. [redacted] was walking around looking for me with an M-16. When they first told me that they couldn't become involved in domestic affairs, I accepted that and told them that he was illegally possessing these weapons and they simply told me to call back when he was in the room.[890]

A young man who had been forced to participate in the production of pornography testified:

> During the trial the only name to come out in the newspaper was my name. I was eleven years old at the time.[891]

A woman whose memories of abuse and forced participation in the production of pornography had remained buried for many years testified:

> If we had the civil ordinance passed, if I had access to something like that, I would be able to pull through the part of me that exists today. I have no means of doing so. All of the statutes of limitations have run out. Most of the time the women that have been abused, statutes of limitations have run out before we even remember we have been sexually abused.[892]

Another woman testified:

> When I think that police, attorneys, legislators, jurors, judges, school teachers and doctors of our country can be desensitized to the suffering of a child, it angers me. A child's justice has been thwarted by the preconditioning of emotions. Victims of sexual violence don't get a fair trial. The true emotions that should be felt have been replaced by sexual fantasies. Victims are a curiosity. People come to see us talk about our genitals as if we are some form of entertainment. Our trial becomes an extension of pornography. So much that even nude photos of us are passed around.[893]

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[886] Public Hearings before Minneapolis City Council, Session I, (Dec. 1983), p. 65.
[887] Washington, D.C., Hearing, Vol. II, p. 46.
[888] Washington, D.C., Hearing, Vol. I, pp. 186–87.
[889] Letter to the Attorney General's Commission on Pornography.
[890] Public Hearings before Minneapolis City Council, Session I, (Dec. 1983), p. 49.
[891] Washington, D.C., Hearing, Vol. II, pp. 47–48.
[892] Washington, D.C., Hearing, Vol. I, pp. 236–37.
[893] Houston Hearings, Vol. II, p. 20183.

Another woman who had been forced into prostitution and the production of pornography alleged that policemen and juvenile facility workers had been among her abusers.

> I don't think that consent was a possibility for a girl who was delivered into the hands of organized crime figures in New Jersey in the dead of night. Others might wonder why I didn't turn to the police for help. As a matter of fact I didn't have to walk all the way to our local headquarters to speak to the police. They were at our apartment every week for their payoff—me.
>
> * * *
>
> When I was sixteen I was sentenced to juvenile detention by the courts. My incarceration was a nightmare of sexual abuse at the hands of the male employees of the facility. One young girl complained to her parents about this on visiting day. That night, after her parents left, she was made an example of. We heard her cries and pleading all night. The official story the next morning was that she had tried to run away, was caught, and was being held in isolation.
>
> * * *
>
> Soon after I was transferred to a facility upstate. When I saw my opportunity I escaped.[894]

**Abuse of Alcohol and Other Drugs**[895]

Several of the witnesses reported the use of various drugs, including alcohol, in connection with the manufacture of pornographic materials. A former *Playboy* bunny testified:

> Drug abuse is deeply interwoven into the *Playboy* lifestyle. I saw marijuana being used at ✂ on a regular basis, and cocaine as well. I began taking moderate amounts of alcohol and tranquilizers thinking it would do no harm but the lust grows for more drugs and alcohol to desensitize the psyche to the sexual perversion.[896]

Some witnesses stated that drugs were used to induce an individual to participate in the production of pornography. For example, a woman who had run away from sexual abuse at home at age thirteen described the use of drugs and nude photographs to initiate her into prostitution:

> The third night I was away from home I was wondering around the streets in a sort of daze when I was befriended by a man about twenty years my senior.
>
> I confided my problems to him and he offered to take me in. During my stay with him he treated me relatively well. He was kind to me, he fed me, and he said he cared about me. He also kept me drugged, spoke glowingly about prostitution and took nude photographs of me.[897]

A young woman who had suffered years of sexual and emotional abuse testified:

> I recall at time, from age thirteen until fifteen, having been drugged and used in group demonstrations. . . .
>
> Money, grass and alcohol were used as inducements by [two of the men in the sex ring] in their seduction process. [One] would use the school bus to pick us up and take us over to another's house in Revere. We were paid five dollars plus we were given beer and grass.[898]

Another young man testified:

> When I was young, my uncle sexually molested me. He introduced me to alcohol and drugs. He took nude photographs of me with body paint . . . .[899]

A woman who at eighteen became a nude model and posed for pornographic films testified:

> He had me sign contract, so that scared me, because I had to go to the office every day, you know, and he would try to tell me that soon I would be there, I would be famous. He got me involved with drugs and made me service him, and if I didn't he would threaten me.[900]

The Commission also heard testimony from witnesses who used the money received for participation in prostitution and pornography to buy drugs. A young man who had been forced to participate in the manufacture of pornography testified:

> I spent all the money on drugs. While hustling, quite often I would be picked up by a

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[894] Washington, D.C., Hearing, Vol. I, p. 182.
[895] These symptoms are characteristic of substance abuse disorders. *See*, *DSM-III*, *supra* note 762, p. 163.
[896] Chicago Hearing, Vol. I, pp. 315–16.
[897] Washington, D.C., Hearing, Vol. I, p. 177.
[898] Washington, D.C., Hearing, Vol. II, pp. 46, 48.
[899] Washington, D.C., Hearing, Vol. I, p. 47.
[900] Los Angeles Hearing, Vol. I, p. 93.

> guy and taken to his house where he would show me homosexual porn films to get him and me turned on. Many times I would be photographed in pornographic poses for private collections. Most often I was involved in prostitution with guys.[901]

Other witnesses said that they used alcohol and other drugs to escape mentally from the abuse they were suffering. For example, one woman testified:

> I escaped prostitution quite by accident. I became a heroin addict. I had been taking other drugs throughout the time I was in prostitution and pornography. They had been supplied and doled out by my pimp. I accepted them because they numbed my physical and emotional pain.[902]

## SOCIAL HARMS

### Loss of Job or Promotion/Sexual Harassment

Reports of sexual harassment similar to those described in the "Physical Injuries" section were also submitted as forms of social injuries. The witnesses stated the harassment was attributable to the presence of pornographic materials and served to reduce their social status:

> I was working as a telephone repairwoman for Southern Bell in Florida. Porn was everywhere. They use it to intimidate you, to keep women out of their territory. They had pin-ups in the workrooms. Male workers would draw pornographic pictures of women workers in the cross-boxes and write comments about what we would do in bed. One day I went to the supply room to get some tools. The inside of the room was covered with pornography. The guy who ran it showed a photograph at me of a woman's rear end with her anus exposed and asked, 'Isn't this you?' I was humiliated and furious.[903]
>
> When I got on the job, three of the trades had set up a nice little shack and had lunch there. And it was a real shock when I walked in because three of the four walls in the room were completely decorated with pictures out of various magazines, *Hustler, Playboy, Penthouse, Oui*, all of those. Some of them I would have considered regular pinups but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage. It was very uncomfortable for me to go down there and have dinner and lunch with about twenty men and here is me facing all these pictures and hearing all these men talking about all the wonderful things they did on the weekend with all of these women. I put up with it for about a week and it finally got to the point where I could no longer tolerate sitting there and realizing that all of these men were there. I felt totally naked in front of these men.[904]
>
> A working woman called the Pornography Resource Center in May 1984 to report that her employer had called her into his office, pushed her down on the floor, ripped her dress, taken a gun out of his pocket, and stuffed it into her vagina. A pornographic picture on the lunchroom wall showed a woman sucking a gun."[905]

Many of the complaints received by Amici are from women workers in nontraditional jobs. The following is typical:

> "I've been a brakewoman for a railroad for almost nine years. . . . I've seen pornographic pictures of a woman with spread thighs being raped by a huge dismembered penis with my name below."[906]

### Financial Losses

The Commission heard reports from individuals who encounter financial consequences attributable to experiences with pornography. Many of these witnesses stated they had suffered financial difficulty because of the need to seek medical and mental assistance because of injuries they attributed to pornographic materials:

> The tangible costs are real and run over five hundred dollars per month for weekly therapy, monthly consultations and outside testing. The hospitalization was nearly thirty thousand dollars. Most major insurance policies have a lifetime maximum benefit of ten to twenty thousand dollars on this type of problem: after that if the victim needs help guess who pays. This has a real dollar cost of over

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[901] Washington, D.C., Hearing, Vol. II, pp. 46, 48.
[902] Washington, D.C., Hearing, Vol. I, p. 182.
[903] Letter to Women Against Pornography submitted to the Attorney General's Commission on Pornography.
[904] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), pp. 85–86.
[905] Testimony to Women Against Pornography, Feb. 1985.
[906] Letter from Montana woman to Women Against Pornography submitted to the Attorney General's Commission on Pornography.

> seventy thousand dollars so far with many months and perhaps years to go.
>
> My oldest daughter has been in therapy for nearly four years receiving help including a two month hospitalization period for evaluation.[907]
>
> Our four year old daughter was sexually molested at-preschool that she attended in ✂ ✂. She attended the school, . . . for approximately ten months in 1984. She was two years old . . . .
>
> She has spoken on many occasions where she was taken to certain residence and other locations where she was molested by strangers and threatened with guns and knives and also photographed. All of this was being kept secret through the continuous threats to our daughter that we would leave her, or, worse, that she would die if we were told the secret.
>
> We spent the past year trying to help our daughter through the fears and anxiety over this experience. She is, and has been for about a year, undergoing psychotherapy on a weekly basis. I have also been receiving psychotherapy . . . .[908]

### Defamation and Loss of Status in the Community

The Commission received testimony from witnesses who reported that pornographic materials were used to place them in a bad light. The witnesses stated that they had been depicted in pornography without knowledge or consent. Although avenues of recourse may have been available, some were advised to avoid further adverse publicity. For example, one woman testified:

> The buyer had their choice of seven famous women pictured in the nude; all of our full names were listed and, of course, choice of color of T-shirt. I was appalled and angry and had meetings with a lawyer regarding what action I should take. All my then advisers, this attorney, my personal manager (regarding career) and my business manager (regarding accounting and finances) advised strongly against taking any action whatsoever. They all concurred that it would be extremely costly and would draw attention to and sell more of these shirts.[909]

Other witnesses stated that pornographic materials were used to hinder their standing within the community. This apparently was particularly true for individuals who had at one time been depicted in pornography. For example, Linda ✂ testified:

> And the fact that this film is still being shown and that my three children will one day walk down the street and see their mother being abused, it makes me angry, makes me sad. Virtually every time someone watches that film, they are watching me being raped.[910]

### Promotion of Racial Hatred

The Commission received statements identifying pornography as a tool to promote racial bias and hatred. Witnesses identified specific pornographic materials which portray persons of color in a derogatory manner. These individuals attributed continued stereotyping and feelings of racial inferiority to the pornographic materials:

> They made other comments, "The only good Indian is a dead Indian." "A squaw out alone deserves to be raped." Words that still terrorize me today.
>
> It may surprise you to hear stories that connect pornography and white men raping women of color. It doesn't surprise me. I think pornography, racism, and rape are perfect partners. They all rely on hate. They all reduce a living person to an object. A society that sells books, movies, and video games like "Custer's Last Stand" on its street corners gives white men permission to do what they did to me. Like they said, I'm scum. It is a game to track me down, rape, and torture me.[911]

### Loss of Trust within a Family

The Commission heard reports of family problems attributed to pornography that were more subtle than some of the massive family ruptures described earlier in this Chapter. Some individuals stated that when a family member used pornography or was subjected to the use of pornography, other members of the family felt the effects. For example, a woman who had been forced to view and participate in the production of pornography in childhood by family members testified:

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[907] Houston Hearing, Vol. II, Anonymous, pp. 178Q1-4.

[908] Miami Hearing, Vol. I, pp. 93-94.

[909] Public Hearings before Minneapolis City Council, Session III, (Dec. 1983), p. 5.

[910] Public Hearings before Minneapolis City Council, Session I, (Dec. 1983), p. 56.

[911] Public Hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 19.

> . . . I am the only member of my family who is speaking out: I am the only member of my family saying "no" to the abuse. It is very, very common that our families lose themselves from us. I have no support with the exception of one younger brother. My family is very angry at me for saying "no" to the abuse. They are very angry about the fact I am identifying it.
>
> My sisters, they are all repeating the cycles of abuse. They are abusing their children and their children are being incested. This is the long-term cycles, the repeating and maintaining of violent life cycles.[912]

**Prostitution**

Witnesses who testified before the Commission and individuals who submitted statements reported several connections between pornography and prostitution. One such connection was the use of pornography as instructional manuals for prostitutes. For example, a former prostitute testified:

> One of the very first commonalities we discovered as a group, we were all introduced to prostitution through pornography: there were no exceptions in our group, and we were all under eighteen. Pornography was our textbook, we learned the tricks of the trade by men exposing us to pornography and us trying to mimic what we saw. I could not stress enough what a huge influence we feel this was.[913]

Another connection was the use of pornographic films by pimps to blackmail the participants:

> I was the main woman of a pimp who filmed sexual acts almost every night in our home. The dope man, who supplied us with cocaine for free in exchange for these arranged orgies, was a really freaky man who would do anything. They arranged to have women, who I assumed were forced to be there, have sex with dogs and filmed those acts. There were stacks of films all over the house, which my pimp used to blackmail people with.[914]

Yet another connection was the use of magazines to stimulate the clientele:

> When I worked at massage studios, the owners had subcriptions to *Playboy, Penthouse, Penthouse Forum* and the like. These magazines were arranged in the waiting area of most of the massage places which I worked in. If a girl was not inside with a trick, she was expected to sit out front with the men who were waiting or who were undecided and to look at the magazines with them in order to get them titillated. They used the soft porn to help them work up the courage to try the acts described in the magazine with the prostitutes at the massage studio.[915]

Women who are or who have been prostitutes identified pornography as a significant factor in prostitution. These individuals reported that pornography was not only used and made of them while engaged in acts of prostitution, but they stated that pornography is used to perpetuate the concept that women are accustomed to being placed in the role of a prostitute.

> I am speaking for a group of women, we all live in Minneapolis and we all are former prostitutes. All of us feel very strongly about the relationship between pornography and prostitution. Many of us wanted to testify at this hearing but are unable because of the consequences of being identified as a former whore. This is absolutely incredible to me that prostitution is seen as a victimless activity and that many women are rightly terrified of breaking their silence, fearing harassment to themselves and families and loss of their jobs.
>
> We have started to meet together to make sense of the abuse we have experienced in prostitution and how pornography endorses and legitimizes that abuse.[916]

**Sexual Harassment in the Workplace**

Several women reported incidents of sexual harassment in the workplace involving the display and use of pornography. For example, one woman said:

> I put up with it for about a week and it finally got to the point where I could not longer tolerate sitting there and realizing that all of these men were there. I felt totally naked in front of these men. The only thing they talked about during lunch period was women, their old ladies, their girl friends, and all their conquests of the weekend.

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912. Washington, D.C., Hearings, Vol. I, p. 241.
913. Public hearings before Minneapolis City Council, Session II, (Dec. 1983), p. 70.
914. *Id.*, p. 79.
915. *Id.*, p. 77.
916. *Id.*

> I got to the point where I couldn't put up with it any more. And being one of the only two women on the job and being rather new at it and not knowing that I had any alternatives, I got pissed off one day and ripped all the pictures off the wall. Well, it turned out to be a real unpopular move to do. I came back in at lunch time and half the pictures were back up again, they pulled them out of boxes and stuck them on the wall and proceeded to call me names. And just basically call me names or otherwise ignore me.[917]

Another woman wrote:

> I was working as a telephone repairwoman for Southern Bell in Florida. Porn was everywhere. They use it to intimidate you, to keep women out of their territory. They had pin-ups in the workrooms. Male workers would draw pornographic pictures of women workers in the cross-boxes and write comments about what we would do in bed. One day I went to the supply room to get some tools. The inside of the room was covered with pornography. The guy who ran it shoved a photograph at me of a woman's rear end with her anus exposed and asked, "isn't this you?" I was humiliated and furious.[918]

A woman testified before another body:

> When I got on the job, three of the trades had set up a nice little shack and had lunch there. And it was a real shock when I walked in because three of the four walls in the room were completely decorated with pictures out of various magazines, *Hustler, Playboy, Penthouse, Oui*, all of those. Some of them I would have considered regular pinups but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage. It was very uncomfortable for me to go down there and have dinner and lunch with about twenty men and here is me facing all these pictures and hearing all these men talking about all the wonderful things they did on the weekend with all of these women. I put up with it for about a week and it finally got to the point where I could no longer tolerate sitting there and realizing that all of these men were there. I felt totally naked in front of these men.[919]

Another woman wrote:

> A working woman called the Pornography Resource Center in May 1984 to report that her employer had called her into his office, pushed her down on the floor, ripped her dress, taken a gun out of his pocket, and stuffed it into her vagina. A pornographic picture on the lunchroom wall showed a woman sucking a gun."

"Testimony to Women Against Pornography, Feb. 1985. Many of the complaints received by Amici are from women workers in nontraditional jobs. The following is typical:

> "I've been a brakewoman for the railroad for almost nine years. . . . I've seen pornographic pictures of a woman with spread thighs being raped by a huge dismembered penis with my name below."[920]

Similar to the harassment reported above, women identified pornography as a tool to continue sexual harassment. Women stated that pornography continued to perpetuate the harassment and alienation.

> After the LEAP Offices and State had written letters to send out to these various employers, my boss, the man who owned the company, called me up one day and said, "Look, I heard you are having a little trouble down there, why don't you just kind of calm down a little bit. Don't make such a mess. We don't need any trouble down there, just calm down, just ignore it." I said, "Hey, I can't ignore it. I don't have to, I can't, it is already done." A couple of days later they got the letter and they were told that this did not comply with the action guidelines.[921]

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[917] Public Hearings before the Minneapolis City Council. Session II. (Dec. 1983), p. 86.

[918] Letter to Women Against Pornography submitted to the Attorney General's Commission on Pornography.

[919] Public Hearings before Minneapolis City Council. Session II. (Dec. 1983), pp. 85–86.

[920] Letter from Montana woman to Women Against Pornography submitted to the Attorney General's Commission on Pornography.

[921] Public Hearings before Minneapolis City Council. Vol. II. (Dec. 1983), p. 88.

# EXHIBIT E

# RECOMMENDATION 39

career in itself, and may in fact further worsen their prospects for stable, long-term employment.[487]

Much participation in pornography, of course, occurs as part of the "career" of juvenile prostitution,[488] and it is worth noting that a significant percentage of youths involved in prostitution have been coerced into "the life."[489]

Many of the difficulties discussed could be eliminated through a prohibition on the use of persons under the age of eighteen in any sexually explicit depiction as desented in the Child Protection Act. Persons between the ages of eighteen and twenty-one would receive the necessary protection through a prohibition against participation in certain scenes of actual sexual activity.

**RECOMMENDATION 39:**

*Congress should enact legislation to prohibit the exchange of information concerning child pornography or children to be used in child pornography through computer networks.*

**Discussion**

Many pedophile offenders and child pornographers have traditionally used the mails as a mainstay of their psychological base as well as the source of information regarding potential victims.[490] Recently, however, pedophile offenders and child pornographers have begun to use personal computers for communications.[491] A person may now subscribe to an information service whereby he or she can contact other subscribers.[492] The services are private commercial enterprises which sell access codes to subscribing members. These services offer everything from "private" communications accessed through individual code words to conference calls.[493] The communication may also take the form of a "bulletin board" message to which any other subscriber may respond.[494]

Personal computers have instant communication capabilities and have afforded subscribers the opportunity to establish extensive networks.[495] Within these networks one or two pedophile offenders or child pornographers will often assume leadership roles.[496] These individuals will coordinate the conversations and activities with other members of the networks.[497]

Subscribers may identify themselves using a first name and will identify the children with whom they are currently sexually involved.[498] The vast network which may develop enables pedophile offenders who live hundreds of miles apart to communicate about contact with a child known to both.[499] During these computerized conversations the offender may describe his actual and imagined sexual exploits with children.

Investigators have discovered that pedophile offenders use personal computer communications to establish contacts and as sources for the exchange or sale of child pornography.[500] The computer user, after establishing a secure relationship with another subscriber, will arrange for materials to be sent through the mail.[501] The subscribers will identify and describe the types of materials they seek. Respondents will then transmit the materials to the designated address.

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[487] See, C. Hix, *Male Model*, (1979), pp. 1965–66. (In answer to the question "Would you advise anyone to do nude modeling as a steppingstone into a legitimate career?" porn star Jack [illegible] said, "Absolutely not. There are a lot of companies, film companies as well, that won't hire you if you have done nude modelling whether it was for *Playgirl* or *Playboy* or whatever." *Id.*, p. 186.)

[488] *Sexual Offences Against Children*, supra note 473, (1984), pp. 1198–99; *Children of the Night* supra note 473, pp. 68–69 (1985) (fourteen of fifty-four juvenile prostitutes for whom information was available had been photographed for commercial photography).

[489] *Huckleberry Study*, p. 34; *Sexual Offences Against Children*, supra note 473, pp. 992–93. These studies indicate that about one in six female prostitutes under age twenty-one had been physically coerced into their roles.

[490] Miami Hearing, Vol. I, Paul Hartman, p. 105.

[491] *Id.*, p. 106.

[492] *Id.*, p. 106–07.

[493] *Id.*, p. 108–10.

[494] During his testimony before the Commission, Postal Inspector Paul Hartman stated, ". . . I accessed a computerized bulletin board and found a message rather casually displayed proclaiming another subscriber's interest in photographs of teen and preteen children." *Id.*, p. 108.

[495] *Id.*, p. 109.

[496] *Id.*, p. 111.

[497] *Id.*

[498] *Id.*

[499] *Id.*111–12.

[500] *Id.*, p. 111.

[501] *Id.*, pp. 108–09.

Pedophile offenders and child pornographers may also use personal computer services to identify particular children who can be used in making child pornography.[502] The subscribers may describe the child physically and give a location where the child may be found.[503]

The technologically complex computer systems and networks operated by pedophile offenders and their multijurisdictional nature should prompt federal interest and substantiate jurisdiction.[504] Each of these systems uses an interstate common carrier, the telephone, as its communication medium. The information about these minors is routinely conveyed between or among various states.

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[502] *Id.*, p. 111.

[503] *Id.*

[504] Hearings before the Senate Judiciary Committee. Subcommittee on Juvenile Justice. Oct. 1, 1985. p. 4: Senator Paul S. Trible, Jr. (R-Va.). and Senator Jeremiah Denton (R-Ala.) have introduced Senate Bill 1305 to amend 18 U S C sections 1462 and 2252 to prohibit the use of computers for the interstate or foreign dissemination of obscene material. child pornography and advertisements for the same and information about minors which can be used for facilitating, encouraging, offering or soliciting sexually explicit conduct with a minor. The legislation provides:

BILL

"To amend title 18. United States Code, to establish criminal penalties for the transmission by computer of obscene matter, or by computer or other means, of matter pertaining to the sexual exploitation of children, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Computer Pornography and Child Exploitation Prevention Act of 1985".

Sec. 2 Section 1462 of Title 18. United States Code is amended by—

1. Inserting after subsection (c) the following:

"(d) any obscene, lewd, lascivious, or filthy writing, description, picture, or other matter entered, stored, or transmitted by or in a computer; or "Whoever knowingly owns, offers, provides, or operates any computer program or service is being used to transmit in interstate or foreign commerce any matter the carriage of which is herein made unlawful; or" and

2. inserting at the end thereof the following:

"For purposes of this section—

1. the term 'computer' means an electronic magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device:

2. the term 'computer program' means an instruction or statement or a series of instructions or statements in a form acceptable to a computer which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system:

3. the term 'computer service' includes computer time, data processing, and storage function: and

4. the term 'computer system' means a set of related connected, or unconnected computers, computer equipment, devices, and software."

c. Any person who knowingly enters into or transmits by means of computer, or makes, prints, publishes, or reproduces by other means, or knowingly causes or allows to be entered into or transmitted by means of compute, or made, printed, published, or reproduced by other means—

1. any notice, statement or advertisement, or

2. any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information.

For purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any minor, or the visual depiction of such conduct, shall by punished as provided in subsection (d) of this section, if such persons knows or has reason to know that such notice, statement, advertisement, or descriptive or identifying information will be transported in interstate or foreign commerce or mailed, or if such information has actually been transported in interstate or foreign commerce or mailed."

Sec. 4 Section 2252 of Title 18. United States Code, is amended—

A recent example occurred in ✂ ✂ where authorities discovered a computer network known as the "Gay Teen Conference" which was operated by a local man. The network could be reached by any computer operator who obtained a special password and it contained descriptions and depictions of various homosexual acts. The operator of "Gay Teen Conference" also operated a religious computer bulletin board known as "Ministry Bulletin Board." A computer operator was able to obtain the password for "Gay Teen Conference" by contacting the "Ministry Bulletin Board."[505] The proposed legislation would provide a useful law enforcement tool in this area of serious concern.

**RECOMMENDATION 40:**

*Congress should amend the Child Protection Act forfeiture section to include a provision which authorizes the Postal Inspection Service to conduct forfeiture actions.*

**Discussion**

The United States Postal Inspection Service is the investigative arm of the United States Postal Service.[506] It has investigative responsibilities over all criminal violations of federal law relating to the Postal Service including the child pornography laws.[507]

The most common method of circulating child pornography has traditionally been through the mail.[508] The mail provides a clandestine and anonymous form of communication for both parties.[509]

The efforts of the Postal Inspection Service in the investigation of child pornography would be greatly enhanced through an amendment to the Child Protection Act permitting the Postal Inspection Service to engage in forfeitures.[510]

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[505] *Seminary Graduate Charge in Porno Computer Network.* The Fayetteville (N.C.) Times. Feb. 7. (1986). p. 14B.

[506] Washington. D.C.. Hearing. Vol. I. Charles Clauson. p. 135.

[507] Postal Crimes fall within two broad categories: Criminal Acts (1) against the postal service or its employees. such as armed robberies. burglaries or theft of mail. and (2) misuse of the postal system such as the mailing of bombs. use of the mails to distribute pornography. *Id.*

[508] Washington. D.C.. Hearing. Vol. 1. Daniel Mihalko. pp. 145–146.

[509] *Id.*. p. 146.

[510] The amendment should be as follows:

To amend the Child Protection Act of 1984 to authorize the Postal Service to conduct civil administrative seizures and forfeitures under the Act. and for other purposes.

Sec. 1. Subsection (b) of section 2254 of title 18 United States Code. is amended by inserting "or the Postal Service" after "the Attorney General."

1. in subsection (a) by striking out "subsection (b)" and inserting in lieu thereof "subsection (c)"

2. by redesignating subsection (b) as subsection (c);

3. by inserting after subsection (a) the following new subsection:

"(b)Any person who knowingly enters into or transmits by means of computer. or makes. prints. publishes. or reproduces by other means. or knowingly causes or allows to be entered into or transmitted by means of computer. or made. printed. published. or reproduced by other means any notice. statement. or advertisement to buy. sell. receive. exchange. or disseminate any visual depiction. if—
"1. the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
2. such visual depiction is of such conduct;

shall be punished as provided under subsection (c). of this section. if such person knows or has reason to know that such notice. statement. or advertisement will be transported in interstate or foreign commerce or mailed. or if such notice. statement. or advertisement has actually been transported in interstate or foreign commerce or mailed."

Sec. 5. Section 2255 of Title 18. United States Code is amended by adding at the end thereof the following new paragraph:

"(5) 'computer' means an electronic. magnetic. optical. electrochemical. or other high-speed data processing device performing logical. arithmetic. or storage function. and includes any data storage facility directly related to or operating in conjunction with such device."

# EXHIBIT F

# RECOMMENDATION 43

The programs should handle child sexual abuse cases resulting from the production of child pornography in a manner which reduces the trauma for the victims and the programs should implement procedures which lead to an increase in successful prosecutions against pornographers who sexually abuse children. The program should also present methods of protecting children from the sexual abuse associated with children pornography and related offenses. Many states undoubtedly will recognize the merit of this program and will take the initiative in implementing these procedures.

Congressional action should also address the need for an effective information network which is essential to law enforcement and social service agencies. The information should be assembled for immediate access to assist law enforcement officers as they proceed with a child pornography or related case. This information network should have specific connections with the Uniform Crime Reporting System operated by the Federal Bureau of Investigation. This type of legislation would facilitate the investigation of child sexual abuse and child pornography cases and would lead to effective methods to curb the flow of child pornography and the continued sexual abuse of children.[521]

**RECOMMENDATION 43:**

*Congress should enact legislation to make the acts of child selling or child purchasing, for the production of sexually explicit visual depictions, a felony.*

**Discussion**

Federal prosecutors have been frustrated in their attempts to convict child buyers under the existing laws because purchasing or selling a child is not presently a crime.[522] In one case involving the sale of children for use in the production of pornography the only resort was for the Assistant United States Attorney to prosecute the offender for an immigration violation.[523]

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[521] This data base should be coordinated with the information system recommended to law enforcement agencies

[522] Miami Hearing, Vol. II, Joyce Karlin, p. 170.

[523] *Id.*

MODIFICATION OF FBI OFFENSE CLASSIFICATION SYSTEM

Sec. 5. The Attorney General shall modify the classification system used by the National Crime Information Center in its Interstate Identification Index, and by the Identification Division of the Federal Bureau of Investigation in its Criminal File, and its Uniform Crime Reporting System with respect to offenses involving sexual exploitation of children by—

1. including in the description of such offenses by the age of the victim and the relationship of the victim to the offenders; and

2. classifying such offenses by using a uniform definition of a child.

AMENDMENT TO PUBLIC HEALTH SERVICE ACT

Sec. 6 a. Section 523 of the Public Health Service Act (42 U.S.C. 290dd-3) is amended—

1. by striking out "subsection (e)" in subsection (a) and inserting in lieu thereof "subsections (e) and (i); and

2. by adding at the end the following new subsection:

"i. Nothing in this section shall be construed to supersede the application of State and local requirements for the reporting of incidents of suspected child abuse to the appropriate State or local authorities."

b. Section 527 of such Act (42 U.S.C. 290cc-3) is amended—

1. by striking out "subsection (e) in subsection(a) and inserting in lieu thereof "subsections (e) and (i)"; and

2. by adding at the end the following new subsection:

Amend the title so as to read "A bill to amend the Child Abuse Prevention and Treatment Act to establish a program to encourage States to enact child protection reforms which are designed to improve legal and administrative proceedings regarding the investigation and prosecution of the child abuse cases, especially child sexual abuse cases."

- Specific legislation would provide additional protection for children and curb the production and distribution of child pornography. Federal prosecutors would have an additional tool available to further the goal of child protection.

# RECOMMENDATIONS FOR STATE LEGISLATION

**RECOMMENDATION 44:**
*State legislatures should amend, if necessary, child pornography statutes to include forfeiture provisions.*

For a general discussion of the use of forfeiture provisions, see, Chapter 13.

**RECOMMENDATION 45:**
*State legislatures should amend laws, where necessary, to make the knowing possession of child pornography, a felony.*

### Discussion

The United States Supreme Court has called child pornography "a serious national problem."[524] In *New York v. Ferber*, the Court said that child pornography constitutes a permanent record of the children's participation in sexual activity, and the circulation of the pornography exacerbates the harm to the children. If the sexual abuse of children in pornography is to be curtailed the production and distribution network must be eliminated.[525]

Investigators have identified several uses of child pornography. The first use by pedophiles is for sexual arousal and gratification.[526] While some pedophiles only collect child pornography and fantasize through it, many have used it as a device to aid in the production of their own child pornography.

Child pornography is often used as part of a method of seducing child victims.[527] A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity.[528] From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography.[529]

A pedophile offender will use child pornography in which the children appear to be having a good time.[530] The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.

Child pornography is also used to illustrate the activities in which the pedophile wishes a child to engage.[531] In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.

Pornographic depictions of a child may be used to blackmail the child.[532] The pedophile offender will use the pictures to intimidate the child. The pedophile offender will threaten the child with showing the pictures to others if the child does not cooperate.

Child pornography is also seen as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors.[533] This subjects a child to repeated victimization by countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies.[534] Child pornography which may have originated as a homemade item may eventually by sold to a commercial child pornography publication.[535]

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[524] *New York v. Ferber*. 458. U.S.. (1982). pp. 747. 749.

[525] Id.. pp. 759–60.

[526] K. Lanning. *Collectors*. in *Child Pornography and Sex Rings*. (A. Wolbert Burgess ed. 1984). p. 86

[527] *Id.*

[528] U.S. Department of Justice. Federal Bureau of Investigation. *Child Molesting: A Behavioral Analysis for Law Enforcement*. (1986). p. 61.

[529] *Id.*

[530] *Id.*

[531] Child pornography magazines frequently include pictures of children viewing child pornography and replicating the poses or scenes depicted therein. Miami Hearing. Vol. I. R.P. "Toby" Tyler. p. 176A4.

[532] Miami Hearing. Vol. II. Paul Der Ohannesian II. p. 51: *See also*. K. Lanning. *Collectors*. in *Child Pornography and Sex Rings*. (A. Wolbert Burgess ed. 1984). p. 86.

[533] K. Lanning. *Collectors*. in *Child Pornography and Sex Rings*. A. Wolbert Burgess ed. 1984). p. 86.

[534] *Id.*

[535] *Id.*

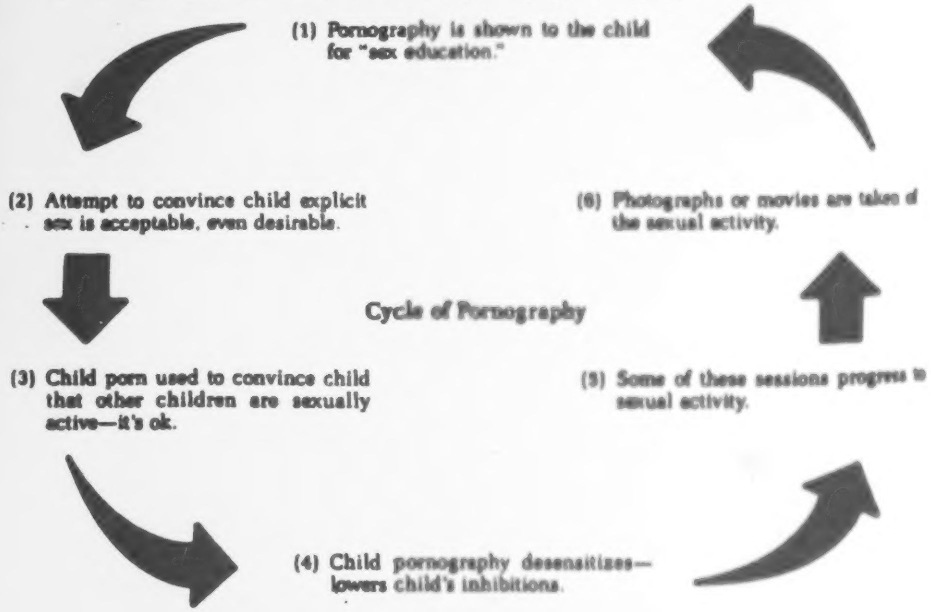
# EXHIBIT G

# RECOMMENDATION 37

**TABLE 3**

*Cycle*

One of the most common questions asked from a public that knows very little about child pornography is: "How does child pornography begin?" This diagram explains one of the most common ways a child is introduced to pornographic activity:



(1) Pornography is shown to the child for "sex education."

(2) Attempt to convince child explicit sex is acceptable, even desirable.

(3) Child porn used to convince child that other children are sexually active—it's ok.

(4) Child pornography desensitizes—lowers child's inhibitions.

(5) Some of these sessions progress to sexual activity.

(6) Photographs or movies are taken of the sexual activity.

Source: S. O'Brien, *Child Pornography*, 89, (1983).

# RECOMMENDATIONS FOR CHANGES IN FEDERAL LAW

**RECOMMENDATION 37:**

*Congress should enact a statute requiring the producers, retailers or distributors of sexually explicit visual depictions to maintain records containing consent forms and proof of performers' ages*

## Discussion

Pornographers use minors as performers in films and other visual depictions.[458] The consumer demand for youthful performers has also created a class of pornography referred to as pseudo child pornography.[459] The growth of pseudo child pornography has made it increasingly difficult for law enforcement officers to ascertain whether an individual in a film or other visual depiction is a minor.

Minors deserve special protection from the risks inherent in the production of pornographic materials.[460] The performers may be subjected to threats and coercion, provided with controlled substances or exposed to a variety of sexually transmitted diseases.[461] The Child Protection Act of 1984[462] is designed to prohibit employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.[463]

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[458] See, The discussion of performers in Part Three.

[459] Pseudo child pornography or "teasers" involve women allegedly over the age of eighteen who are "presented in such a way as to make them appear to be children or youths. Models used in such publications are chosen for their youthful appearance (e.g., in females, slim build and small breasts); and are presented with various accoutrements designed to enhance the illusion of immaturity (e.g., hair in ponytails or ringlets, toys, teddy bears etc.).

'Pseudo child pornography' is of concern since it may appeal to the same tastes and may evoke responses similar or identical to those elicited by true child pornography. However, it is distinct from, and is not 'genuine' child pornography in the sense that it is older adolescents or adults who are displayed in these sexually explicit depictions. It is not individual children who have been directly exploited in the making of such materials. Committee on Sexual Offences Against Children and Youth, 2 *Sexual Offences Against Children*, 1192 (1984). [hereinafter cited as *Sexual Offences Against Children*].

This proposed legislation should afford protection to minors through every level of the pornography industry. The recordkeeping obligation should be imposed on wholesalers, retailers, distributors, producers and anyone engaged in the sale or trade of sexually explicit material as described by the Child Protection Act.

The concern to be addressed through this legislation is the safety and well-being of children. The current law contains gaps which allow the exploitation of minors to continue. Legislation should be drafted to close the gaps and afford children full protection in every phase of the production and distribution of sexually explicit materials.

Producers would be required to obtain proof of the age of the performer and record the same on a signed release form if the performer engages in any sexual act which would be in violation of the Child Protection Act.[464]

Despite the umbrella protection provided by the Child Protection Act of 1984, loopholes remain that permit the continued exploitation of children. For example, experts and law enforcement officers have found it difficult to extend this protection because in many instances, ascertaining the real ages of adolescent performers is impossible. By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one? The growth of the category of pseudo child pornography has further confused the issue.

The above legislation will assist officials in assuring the safety and well being of children.

The recommended legislation would require producers to obtain release forms from each performer with proof of age.[465] The forms would be filed at a specified location listed in the opening or closing footage of a film, the inside cover of the magazine or standard locations in or on other material containing visual depictions.[466]

The name, official title and location of the responsible person or corporate agent supervising such records would also be listed to avoid use of corporate shields. The release forms should be available for inspection by any duly authorized law enforcement officer upon demand as a regulatory function for the limited purposes of determining consent and proof of age.[467] The information contained in these records should not be used as evidence of obscenity or related offenses in a grand jury proceeding or by a petit jury or trier of fact, but should only be used for prosecution of this offense. This exception from use in evidence is necessary to secure compliance by the largest number of persons and avoid Fifth Amendment problems.

A producer should be required to maintain these records for a minimum period of five years.[468] Failure to comply with any of these requirements would be punishable as a felony. This legislation would not only protect minors from abuse, but it would also place the burden of ensuring this protection was implemented squarely on the producers of the materials. The proposed legislation would serve a record-keeping purpose comparable to that found in environmental and similar statutes.[469] Performers in pornography face more risks than just sexual abuse. A decision by young performers to appear in pornographic materials has serious implications for his or her future personal life and career prospects. The existence of the material and its intermittent resurfacing may destroy employment prospects and threaten family stability.[470]

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[460] See, *New York v. Ferber*, 458 U.S., (1982), p. 758.

[461] See, The discussion of performers, *infra*.

[462] 18 U.S.C. §§ 2251–2252 (1985).

[463] Id.

[464] Producers may fulfill the proof of age requirement through obtaining a driver's license, birth certificate or other verifiable and acceptable form of age documentation.

[465] The release forms should also include the stage names of the performers as well as any other aliases the performer may use, fingerprints to avoid forgery or fraudulent certification and the last known address and telephone number for the purpose of verification.

[466] "I think consent is a very important part of freedom . . . we all want to increase voluntarism and decrease lack of consent whether that be by models or purchasers of magazines." New York Hearing, Vol. II, Alan Dershowitz, p. 312.

[467] This inspection requirement would be similar to the inspection provision included in section 3007 of the Resource Conservation Recovery Act of 1976, as amended in that search warrant would not be necessary for routine examination of records.

[468] The five-year requirement would commence the date the film was released or the magazine was distributed.

**RECOMMENDATION 38:**
*Congress should enact legislation prohibiting producers of certain sexually explicit visual depictions from using performers under the age of twenty-one.*

**Discussion**

Producers are currently proscribed through the Child Protection Act from using performers under the age of eighteen to engage in various sexually explicit materials. The proscribed acts include actual or simulated:

A. sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
B. bestiality;
C. masturbation;
D. sadistic or masochistic abuse; or
E. lascivious exhibition of the genitals or pubic area of any person.[471]

The Act should be amended to protect performers under the age of twenty-one. The amendment should prohibit producers from using persons between the ages of eighteen and twenty-one in visual depictions of certain sexually explicit activities. The proscribed activities should include actual:

A. Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
B. Bestiality;
C. Masturbation;
D. Sadistic or masochistic abuse; or
E. Lascivious exhibition of the genitals or pubic area of any person.

Persons between the ages of eighteen and twenty-one while physically mature still face problems associated with sexually explicit performances. These risks include: pregnancy,[472] sexually transmitted disease.[473]

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[469] Examples of similar recordkeeping legislation and the penalties are: The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) which provides, "The Administrator may prescribe regulations requiring producers to maintain such records with respect to their operations and the pesticides and devices produced as he determines are necessary for the effective enforcement of this Act." 7 U.S.C. S1361 (3) FIFRA also gives the administrator of the Environmental Protection Agency the authority to inspect the premises to ensure compliance. "(b) Inspection—For the purposes of enforcing the provision of this Act, any producer, distributor, carrier, dealer, or any other person who sells or offers for sale, delivers or offers for delivery any pesticide or device subject to this Act, shall, upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, duly designated by the Administrator, furnish or permit such person at all reasonable times to have access to, and to copy: (1) all records showing the delivery, movement, or holding of such pesticide or device, including the quantity, the date of shipment and receipt, and the name of the consignor and consignee; or (2) in the event of the inability of any person to produce records containing such information, all other records and information relating to such delivery, movement, or holding of the pesticide or device." 7 U.S.C. S 1361; Failure to comply with the provision may result in civil or criminal penalties. "Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who knowingly violates any provision of this Act shall be guilty of a misdemeanor and shall on conviction be fined not more than $25,000, or imprisoned for not more than one year, or both." 7 U.S.C. S136n. The Resource Conservation and Recovery Act of 1976 requires hazardous waste generators, transporters and owners and operators of treatment, storage and disposal facilities to maintain adequate business records. See, 42 U.S.C. SS3002, 3003, 3004. If the records are not maintained, the owner, operator, generator or transporter of hazardous waste may be subject to civil and criminal penalties. "Any person who—" (3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator under this subtitle: shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2), or both). If the conviction is for a violation committed after a first conviction of such person under this paragraph, shall be doubled with respect to both fine and imprisonment." 42 U.S.C. S3008.

[470] Los Angeles Hearing, Vol. II, Miki Jr. pp. 118-20; Washington, D.C., Hearing, Vol. II, Tom, p. 50.

[471] 18 U.S.C. S2255 (1985).

[472] Enablers, Inc., *Juvenile Prostitution in Minnesota* 86 (1978) (over one-half of juvenile female prostitutes had been pregnant at least once; thirty percent had been pregnant two or more times).

[473] See, e.g., Enablers, Inc., *supra* note 472, at 85, (half of the female prostitutes interviewed indicated they had venereal disease); D.K. Weisberg, *Children in the Night* 107 (1985) [hereinafter cited as *Children in the Night*] (venereal disease "plagues" juvenile prostitutes; and is their "most prevalent health concern"); 2 *Sexual Offences Against Children*, (1984), p. 1024, (majority of juvenile prostitutes studied in Canada had contracted a sexually transmitted disease, and almost a third do not seek regular medical attention).

# EXHIBIT H

# RECOMMENDATION 2

ments used in or derived from obscenity law violations.[102] The RICO statute currently is inadequate to reach the profits and instruments without establishing and relying on proof of two or more predicate offenses. The proposed legislation would allow forfeiture in the many cases where RICO cannot appropriately be used.

**RECOMMENDATION 2:**

*Congress should amend the Federal obscenity laws to eliminate the necessity of proving transportation in interstate commerce. A statute should be enacted to only require proof that the distribution of the obscene material "affects" interstate commerce.*

**Discussion**

Pursuant to provisions of 18 U.S.C. S1462 and 18 U.S.C. S1465 the United States is required to prove that the particular obscene material in question actually was transported in interstate commerce at a particular specified time and to and from particular and specified locations.[104]

This has become an increasingly insurmountable burden for federal prosecutors to meet in obscenity cases. Distributors of obscenity, especially those associated with or members of organized crime families, frequently avoid the mails and common carriers when they ship their wares. With the assistance of their attorneys such persons and or-

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[103] See, Recommendations For State and Local Law Enforcement Agencies, *infra* for further discussion.

[104] 18 U.S.C. S1462 (1982) provides, in part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses an express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

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(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The Court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profit or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land, and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section);

18 U.S.C. S2318. (counterfeit labels; (d) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed);

18 U.S.C. S2344. (c) Any contraband cigarettes involved in any violation of the provision of this chapter shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating of the seizure, forfeiture, and disposition of firearms, and defined in section 5845(a) of such Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter); and

18 U.S.C. S2513. (Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 of section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) at the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in Title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeding from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation top informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provision of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs law contained in Title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents or other persons as may be authorized or designated for that purpose by the Attorney General.)

ganizations have developed intricate schemes of operation to prevent proof of this necessary element of the present statute.[105] They use their own trucks and sometimes make several stops or simulated deliveries or pickups along the way.[106] This process thwarts extremely expensive and time consuming surveillance by law enforcement officers and makes it virtually impossible to detect which items in a particular shipment actually crossed state lines.

The proposed amendment should take the form of an additional section of Title 18. Such sections should supplement existing sections 1462 and 1465 and include language which prohibits activities that "affect" commerce. The addition of such a statute would facilitate prosecutions while maintaining the integrity of the present statutory structure. In a multiple count indictment, charges could be brought against individuals under both sections, subject to constitutional limitations which exist in any such case. Legislation which creates a separate violation would prevent the effects of the inevitable and lengthy initial constitutional challenges to such new legislation from crippling or stopping all federal prosecutions.

A requirement that the prosecution prove the transaction "affects" commerce is a more realistic burden of proof which would close the technical loopholes these criminals have so successfully exploited. This requirement would be consistent with other federal statutes such as the Hobbs Act and the firearms laws.[107] An examination of the constitutional ramifications discloses no barrier to this proposed amendment.[108]

Article I, Section 8 of the United States Constitution empowers Congress to regulate commerce.[109] The interpretation and application of the constitutional limits on Congress' power to regulate has been the issue in many cases whose factual bases are widely divergent. The subject of regulation, whether it is production, distribution or consumption, is constitutionally immaterial so long as the activity in question is within the sphere of Congress' regulatory powers.[110] The underlying principles, however, have been applied consistently to a variety of factual situations. The particular subject matter of the statute should not present a barrier to a constitutionally valid amendment.

The distinction between regulating activities "in commerce" and regulating those which "affect commerce" is a valid one and has been maintained. The standards, however, have been recognized by the courts as being within the total ambit of Congress' constitutional regulatory powers.[111] The decision as to the scope of regulatory jurisdiction lies with Congress and is generally made as a matter of public policy rather than a decision dependent purely on legal considerations.

If the activity is other than purely local in

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[105] Los Angeles Hearing, Vol. I, Kenneth Gillingham, p. 114-16.

[106] *Id.*

[107] See, e.g., 18 U.S.C. SS844, 1951 and 1202.

[108] See, *Wickard v. Filburn*, 317 U.S. 111(1942).

[109] "Section 8. [1] [The Congress shall have Power] [3] to regulate the Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, S8, cl.3.

[110] See, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). More recent cases indicate the validity of the Court's earlier decisions and the ultimate expanse of Congress' power to regulate. These cases represent a variety of legal and factual issues, but each one affirms the underlying principals of the preceding cases. See, e.g., *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974); *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232(1978); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d. 813 (9th Cir. 1982).

[111] See, *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 241(1979). "The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities in interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect interstate commerce*." (emphasis added).

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(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; * * *;"

18 U.S.C. S1465 provides, in part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other articles capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

nature it is subject to federal commerce power regulation. It is within this constitutional grant that Congress may exercise discretion in setting the limits of jurisdiction. Since Congress has already Constitutionally chosen to regulate the activity through 18 U.S.C. SS1462 and S1465, it may, if it chooses, expand the regulatory jurisdiction to include activities which "affect" commerce as well as those "in" commerce.

This Commission finds that virtually all distribution of obscene material substantially affects interstate commerce.

Department of Justice Guidelines now in effect for the United States Attorneys preclude federal prosecution of obscenity cases that properly belong in state courts.[112] Existing guidelines require the United States Attorneys to give higher priority to cases involving large scale distributors who realize substantial income from multi-state operations and cases in which there is evidence of involvement by known organized crime figures.[113] These are the types of cases that require the operational resources of the Department of Justice and federal law enforcement agencies and are accordingly beyond the scope of local law enforcement capabilities.[114] The new section would be a substantial aid to federal prosecutors' efforts, but properly applied it would not result in any more federal encroachment on state prosecutors' prerogatives than present federal law permits.

**RECOMMENDATION 3:**

*Congress should enact legislation making it an unfair business practice and an unfair labor practice for any employer to hire individuals to participate in commercial sexual performances.*

**Discussion**

This Commission does not advocate nor does it condone the use of individuals in commercial sexual practices. The Commission strongly supports enforcement of existing criminal laws against those who violate them by using individuals in commercial sexual performances or in the production of obscene materials. The Commission does, however, recommend imposing fair labor standards on those businesses which engage individuals to perform sexual acts for commercial purposes. This recommendation is made only out of an abiding concern for those persons used in these sexual performances.

The production of obscene material, like many forms of criminal activity, is an enterprise patterned after other legitimate business structures.[115] Producers of obscene material make capital investments, hire employees, and earn sizeable profits. Unlike other businesses, the regulations governing the production of obscenity are largely self-imposed or non-existent. This industry has been called the "last vestige of true laissez-faire capitalism" in the United States.[116] Unlike more conventional businesses and industries, profits from obscene materials go largely untaxed and their employees often suffer varying degrees of mental and physical injury.[117] Seldom, if ever, do employees maintain

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[112] The guidelines provide, "The Federal role in prosecuting obecenity cases is to focus upon the major producers and interstate distributors of pornography while leaving to local jurisdiction the responsibility of dealing with local exhibitions and sales. This role has not met with complete acceptance and understanding by citizens of communities confronted with offensive matters who find their local prosecutor ineffectual in this area. Even so, local prosecutors have been regarded as having the primary obligation to deal with such material on a local level.

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Local prosecutors, however willing to prosecute, frequently experience difficulty because of several factors, notably a lack of expertise in the field, lack of support by the community and/or its officials, and lack of necessary funds. In these circumstances the United States may provide assistance through prosecutive efforts not falling precisely within the above guidelines. Conversely, local authorities dealing with obscene material being distributed within their area may develop evidence of interstate distribution useful to a Federal prosecution. Communications between Federal and local prosecutors, and coordination of efforts in such instances, can be highly productive in both Federal and local efforts." United States Department of Justice, *United States Attorneys' Manual*, Ch. 75, p. 9a (June 18, 1981).

[113] Chicago Hearing, Vol. II, James S. Reynolds, p. 263.

[114] New York Hearing, Vol. II, William Johnson, p. 82.

[115] Chicago Hearing, Vol. II, Duncan McDonald, p. 59.

[116] *Id.* at 61: The value of society's goods always derives from the values of its people. A democratic society that is unwilling to bar *Hustler* on public newsstands or ban billboards from beautiful views cannot justly blame capitalism for these offenses. It is up to the political, judicial, and religious institutions of the society, not other businesses, to eliminate such opportunities for ugly profit. Capitalists perform a vital role in determining what goods and services are initially offered to the public. But the people and their government determine the limits of what can be marketed. Markets provide the ultimate democracy; democracy, though, defines the marketplace. G. Gilder, *The Spirit of Enterprise*, 91(1984).

[117] See, The discussion of performers in the pornography industry for further information.

# EXHIBIT I

## RECOMMENDATION 1

# RECOMMENDATIONS FOR CHANGES IN FEDERAL LAW

**RECOMMENDATION 1:**

***Congress should enact a forfeiture statute to reach the proceeds and instruments of any offense committed under the Federal obscenity laws.***

**Discussion**

The addition of civil and criminal forfeiture provisions to the existing federal obscenity laws[90] would greatly enhance their deterrent effect. In addition to the penalties already prescribed by statute, a defendant would be subject to forfeiture of any profits derived from or property used in committing the offense. The Child Protection Act of 1984[91] presently contains such forfeiture provisions pertaining to offenses involving child pornography.[92]

The addition of forfeiture provisions in the federal obscenity statutes would have a profound effect on some of the most egregious offenders, especially those who are members of, associated with, or are influenced or controlled by, organized crime families. The forfeiture provision would affect those who profit by their illegal activity and who have created criminal enterprises large enough to own or lease real estate, fleets of motor vehicles, or other valuable assets. The loss of such valuable property would have a more significant deterrent effect than the mere imposition of a fine or modest period of incarceration which the offender may see as merely another "cost of doing business."[93] Forfeiture provisions would also aid law enforcement efforts by providing the government with property to be used in future undercover operations and perhaps even provide sufficient assets to reimburse a significant portion of investigative and prosecution costs.

According to the federal prosecutor in a series of Miami, Florida, obscenity cases commonly known as MIPORN where many of the defendants had tremendous assets scattered throughout the United States, forfeitures would have made a tremendous contribution toward underwriting the costs of the government investigation.[94]

Under current law even large scale and well-organized distributors of obscene material that have been repeatedly convicted retain their massive profits which they often use to finance other unlawful activity.[95] It is estimated that the film "Deep Throat" cost $25,000 to produce and has made profits of $50,000,000,[96] and few or none of these proceeds were paid to the "star" of the film, Linda Lovelace (now [redacted]) or others involved in the actual production.[97] The film's profits were used allegedly by the [redacted] reported members of the Columbo organized crime family,[98] to develop [redacted] Films of Hollywood, which distributed the horror film, "The Texas Chainsaw Massacre,"[99] to purchase yachts, airplanes, islands and property in the Bahamas, and as seed money for drug smuggling activities.[100]

In recognition of the need to seize substantial profits gained through unlawful activity and to prevent their use in other crimes, Con-

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[90] See, 18 U.S.C. SS1461–1465 (1985).

[91] 18 U.S.C.A. S2251 (West Supp. 1982).

[92] See, Recommendations for the Regulation of Child Pornography, *infra*.

[93] The precise items subject to forfeiture should be determined by Congress with any constitutional limitations clearly recognized.

[94] "MIPORN was a two and a half year undercover investigation into organized crime's influence in the pornography industry." New York Hearing, Vol. II, Marcella Cohen, p. 41; MIPORN is further discussed in Appendix One to the Organized Crime Chapter.

[95] New York Hearing, Vol. I, Christopher J. Mega, pp. 166–67.

[96] New York Hearing, Vol. I, William Kelly, p. 71.

[97] New York Hearing, Vol. I, Linda [redacted], p. 63.

[98] [redacted] are reported members or associates of the Columbo organized crime family. See, The discussion of Organized Crime for further information.

[99] New York Hearing, Vol. I, William Kelly, p. 74.

[100] New Hearing, Vol. I, Christopher J. Mega, p. 162; See also, Cong Rec. S433 (daily ed. Jan. 30, 1984) (Statement of Sen. Jesse Helms).

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areas if obscenity enforcement was given greater emphasis. "I think there is a great deal of time spent on thefts, minor thefts; and yes, they are important. But I think that obscenity has more far-reaching effects on our culture and is important." Miami Hearing, Vol. II, Barbara Hattemer, p. 96.

gress has authorized forfeiture for other crimes.[101] Any new legislation should be drafted and implemented in a manner similar to other present federal laws to insure due process of law to all parties in interest.[102]

The only present authority to permit the forfeiture of profits and instruments derived from the distribution of obscene materials is RICO. Through 1985 no federal RICO cases have been brought to forfeit profits or instruments used in or derived from obscenity law violations.[103] The RICO statute currently is inadequate to reach the profits and instruments without establishing and relying on proof of two or more predicate offenses. The proposed legislation would allow forfeiture in the many cases where RICO cannot appropriately be used.

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[101] See e.g., 21 U.S.C. S881(a)(1).
((a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2).

(5) All books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all money, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.);

18 U.S.C. S492. (All counterfeits of any coins or obligations or other securities of the United States or of any foreign government, or any articles, devices, and other things made, possessed, or used in violation of this chapter or of sections 331-333, 335, 336, 642 or 1720, of this title, or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority from the Secretary of the Treasury or other proper officer, shall be forfeited to the United States);

18 U.S.C. S924 ((d) Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promuleged thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provision of the Internal Revenue Code of 1954 relation to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall so far as applicable, extend to seizures and forfeiture under the provision of this chapter);

18 U.S.C. S1955. (illegal gambling businesses; (d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law related to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of his section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General).

18 U.S.C.A. S1963 (West Supp. 1985). ((a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of Section 1962;
(2) any—
  (A) interest in;
  (B) security of;
  (C) claim against; or
  (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

[102] See also, The discussion in this Chapter of Recommendations for Changes in State Law, *infra*.

**RECOMMENDATION 2:**

*Congress should amend the Federal obscenity laws to eliminate the necessity of proving transportation in interstate commerce. A statute should be enacted to only require proof that the distribution of the obscene material "affects" interstate commerce.*

**Discussion**

Pursuant to provisions of 18 U.S.C. S1462 and 18 U.S.C. S1465 the United States is required to prove that the particular obscene material in question actually was transported in interstate commerce at a particular specified time and to and from particular and specified locations.[104]

This has become an increasingly insurmountable burden for federal prosecutors to meet in obscenity cases. Distributors of obscenity, especially those associated with or members of organized crime families, frequently avoid the mails and common carriers when they ship their wares. With the assistance of their attorneys such persons and or-

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[103] See. Recommendations For State and Local Law Enforcement Agencies, *infra*, for further discussion.

[104] 18 U.S.C. S1462 (1982) provides, in part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses an express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or —

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

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(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly from racketeering activity or unlawful debt collection in violation of section 1962.

The Court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profit or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land, and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section);

18 U.S.C. S2318. (counterfeit labels: (d) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed);

18 U.S.C. S2344. (c) Any contraband cigarettes involved in any violation of the provision of this chapter shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating of the seizure, forfeiture, and disposition of firearms, and defined in section 5845(a) of such Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter); and

18 U.S.C. S2513. (Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 of section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) at the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in Title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeding from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation top informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provision of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs law contained in Title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents or other persons as may be authorized or designated for that purpose by the Attorney General.)

# EXHIBIT J

## RECOMMENDATION 5

insurance, pay benefits or provide pension plans to performers or others who work for them.

Congress should enact legislation, as necessary, that would specifically subject the production of obscene materials to the same types of laws and regulations as other businesses. This would not necessarily involve criminal statutes or penalties, but rather it could take the form of civil regulatory statutes. These are not recommended as exclusive remedies, but as a form of regulation that parallels other existing forms of criminal and civil relief. The basis for these statutes is the government's broad powers to regulate commerce.

Legislation also should be enacted that would make it an unfair business practice and an unfair labor practice to hire individuals to participate in certain sexual performances for purposes of producing sexually explicit materials. Included in the prohibited activities should be sexual performances involving children, violence, sado-masochism, or anything which would meet the description of unlawful sexually explicit depictions developed in such federal law.

Congress should prohibit the sale and distribution of any product made as a result of those unfair practices and provide a civil cause of action for any party injured as a result of these practices.[118] The law should also provide protection for individuals who are used as actors or models in obscene material. Such legislation should make any contracts for prohibited performances void, and provide a formula for the determination of damages and payment of attorneys fees. Existing laws and regulations prohibit an employer from imposing dangerous, unhealthy, or unfair conditions of employment on an employee. Employees have a remedy if they are harmed in the course of their employment. None of these requirements have been applied to the pornography industry where these risks are truly pervasive. It is essential that the commercial laws and regulations be applied in a fair and even-handed manner. Business enterprises should be prevented from operating in a manner which jeopardizes the welfare of its employees.

**RECOMMENDATION 4:**

*Congress should amend the Mann Act to make its provisions gender neutral.*

**Discussion**

The Mann Act[119] makes it a federal offense to transport "any woman or girl" in interstate or foreign commerce for the purpose of "prostitution or debauchery, or for any other immoral purpose, or with intent and purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to immoral practice, debauchery or to engage in any other immoral practice."[120] Men and boys who are used in prostitution and in the production of obscene materials are often transported in commerce for the very purposes proscribed in the present statute.[121] Those who exploit men and boys for illegal and immoral purposes should be subject to the same punishment as those who exploit females.

The proposed amendment would simply afford protection to a class of persons who are without adequate legal redress. While women and girls may continue to comprise the majority of such cases of exploitation these statistics should provide no excuse to exclude men and boys from equal protection purely on the basis of the smaller number of reported cases.[122]

Further, the Act should be amended to prohibit *illegal* acts rather than the current prohibition against immoral acts. This amendment would address and alleviate the concerns of those who suggest an overzealous prosecutor may use the Act to harass individuals engaged in lawful consensual sexual activity. This amendment would not expand the scope of enforcement or prosecution and it should set clear guidelines for the types of activities that are proscribed.

**RECOMMENDATION 5:**

*Congress should amend Title 18 of the United States Code to specifically proscribe obscene cable and satellite television programming.*

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[118] This could be in the form of a civil rights type approach.

[119] 18 U.S.C. S2421 (1985).

[120] Id.

[121] See, *Comm. v. Richard Kind*, C-19168; *Comm. v. Theodore Dufresne*, C-19906; and *Comm. v. Alfredo Martin*, C-19568 Circuit Court of Arlington County, Virginia.

[122] ". . . statistically there appears to be no particular preference on the part of the child molesters for victim. It's about 50 percent of the time boys and 50 percent of the time they are girls. So clearly boys ought to be included under the Mann Act." Washington, D.C., Hearing, Vol. I, Senator Mitch McConnell, p. 38.

**Discussion**

The United States Code proscribes the utterance of "any obscene, indecent or profane language by means of radio communication."[123] Because cable and satellite television programming is not conveyed by any means interpreted by the courts to be a radio communication, any obscene programming is not covered by the prohibitions of the present statute.

The Cable Communications Policy Act of 1984 attempts to provide another avenue for the prosecution of obscenity shown over cable television.[124] The Act, provides:

> Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10.000 or imprisoned not more than 2 years, or both.[125]

The provisions of this section may be in conflict with two other sections of the act governing editorial control of programming by cable operators. Section 531(e) of Title 47 provides that:

> Subject to Section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational or governmental use of channel capacity provided pursuant to this section.
>
> In addition. Section 544(d) provides, in part:
>
> (1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States (2) (A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during period selected by that subscriber.

Section 544(d) seems to contemplate allowing the operator to provide obscene programming while Section 559 makes it a crime to do so. The apparent conflict should be resolved and legislation should provide clear guidance for cable operations, federal prosecutors and law enforcement officers.[126]

**RECOMMENDATION 6:**
*Congress should enact legislation to prohibit the transmission of obscene material through the telephone or similar common carrier.*

**Discussion**

This Commission has received substantial evidence of the use of the telephone to transmit obscene material.[127] Dial-A-Porn services offer the caller the opportunity to participate in obscene telephone conversations or to receive obscene messages.[128]

Two years ago, the Congress enacted legislation amending section 223 of the Communications Act of 1934.[129] This enactment

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[123] 18 U.S.C. S1464.

[124] 47 U.S.C. S559.

[125] *Id.*

[126] Senate Bill 1090 sponsored by Senator Jesse Helms (R-NC) would place a specific prohibition against obscene cable programming by amending Section 1464 of Title 18 of the United States Code. The Helms Bill provides in part:

1464. Distributing obscene material by radio or television.

"(a) Whoever utters any obscene, indecent, or profane language, or distributes any obscene, indecent, or profane material, by means of radio or television, including cable television, shall be fined not more than $50.000 or imprisoned not more than two years, or both."

"(b) As used in this section, the term "distributes" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire or satellite, or produce or provide such material for distribution."

The standard language of Title 18 provides several synonyms for the word "obscene". 18 U.S.C. S1461 provides, "Every obscene, lewd, lascivious, indecent, filthy or vile . . ."

Enactment of legislation of this type would enable United States Attorneys to prosecute violators under the criminal code and alleviate the possible conflict under the Cable Communications Policy Act.

[127] See, Los Angeles Hearing, Vol. I, William A. Dunkle, p. 248; Los Angeles Hearing, Vol. I, Judith F. Trevillian, p. 263; Los Angeles Hearing, Vol. I, Brent D. Ward, p. 225. The most commercially prolific form of dissemination of pornographic material is through services commonly referred to as "Dial-A-Porn."

[128] See, The discussion of the Dial-A-Porn services available for further information.

[129] See, 47 U.S.C. S223(b)(1).

Senator DECONCINI. Thank you, Mr. Sears.
Mr. Wooden.

## STATEMENT OF KENNETH WOODEN, EXECUTIVE DIRECTOR, NATIONAL COALITION FOR CHILDREN'S JUSTICE, SHELBURNE, VT

Mr. WOODEN. Thank you.

Eleven years ago, I worked with CBS "60 Minutes" on a program called "Kiddie Porn." I testified before the Congress on that issue. With the exception of what I heard from Rev. Jerry Kirk, I have heard nothing new in 11 years. The clock is ticking and another generation of kids are being ripped off.

Barry Lynn, with all due respect, sounds like a broken record I heard 11 years ago. I wonder whatever happened to the "contributing to the delinquency of a minor" statute, as more and more kids are being ripped off.

As I travel around the country, in between my reporting I work with children. I go into the elementary and junior high schools of America. And those kids are telling me what they are seeing in videotapes.

Senator, if I came to your State promoting prostitution, extortion, blackmail, incest and AIDS, would you welcome me? Of course not. But these are the themes of the videotapes that children are watching, the children I call "the VCR generation," kids that are recording, sharing and viewing those themes.

I just received this booklet in the mail, "Understanding AIDS." Wonderful. But yet the children of America are watching "Debbie Does Dallas," where a high school coach sodomizes a high school cheerleader and then forces her to perform oral sex.

I have one major recommendation to make to the Congress. I think you should seriously consider amending your legislation to extend the statute of limitations; 1 year, 3 years is not enough, as each succeeding generation is exploited. There is a precedent for extending the statutes of limitations I would like to submit for the record.

Let me read you the lawsuit—a 1987 case, *Mire* v. *Gauthe* in Louisiana. In this lawsuit an adult won a $1.8 million judgment because he was raped by a clergyman when he was a young altar boy. The precedent was set when his lawyer said, "We used the theory of law that a clock does not begin to tick until the victim becomes aware of the harm."

Let us give 63 million Americans that are now children, the legal benefit of that clock. Let us extend the statute of limitations. It is so nice to hear all these publishers—and I am a publisher now—say they are against child pornography. Perhaps they too will support the extension of the statute of limitations.

Once again, as someone who has been reporting on this for 11 years, I urge you to amend this legislation with extension of the statute of limitations to protect our children.

Thank you, Mr. DeConcini, for your leadership.

[The prepared statement of Mr. Wooden follows:]

# TESTIMONY

for

The Senate Committee on the Judiciary

S. 2033 - Child Protection & Obscenity Enforcement Act
S. 703 - Pornography Victims Protection Act of 1987

by

Kenneth Wooden--Author, Investigative Reporter/Producer
Founder, The National Coalition for Children's Justice

June 8, 1988
10:00 a.m. - Room 226
Dirksen Senate Office Building

## VCR CHILDREN & ADULT PORN - A Journalistic Perspective

SENATORS, if I came into your State to openly promote prostitution, extortion, blackmail, incest, and AIDS, would you welcome me into your communities, your schools, your homes? Of course you wouldn't. Yet, in every neighborhood of every State, hardcore videos that legitimatize and glamourize these themes can be purchased or rented at "family" video stores. And, our children are watching them.

Those who unequivocally support pornography dismiss its corrupting influence on children with comments such as, "We only deal with people of age" or "Parents should monitor what their kids watch." Rapid expansion of the VCR market, however, makes such comments irrelevant. A generation of VCR children are viewing, taping, and sharing hardcore porn that was rented or purchased by an adult.

As all of us grapple with the legal rights of adults to view porn vs. the moral and legal rights of children to be protected from that same porn, let me share in brief summary some of the things I have learned during some 15 years of journalistic reporting on children's issues--from "Sixty Minutes" to "20/20."

### DATELINE: Reading, Pennsylvania

At the invitation of Police Chief Rod Steffy, I presented my CHILD LURES Prevention Program to some 2,000 students--700 elementary, 300 junior high and 1,200 high school children. At the close of the three classes, I posed this question in the manner appropriate for each age group, "How many of you have access to videos of people without clothing engaging in sex acts--you know, X-Rated films?" Five hundred elementary children raised their hands, as did 200 in junior high and almost every high school student.

The same pattern was true in other schools I visited in Fort McClellan, Alabama; North Adams, Massachusetts; suburbia Cincinnati, Ohio; Kansas City, Missouri; and Chattanooga, Tennessee. My survey (which is attached to this testimony) showed that 75% of Junior High/High School students have viewed hardcore porn: between 35 and 50% of elementary children have watched the same.

### DATELINE: Shelburne, Vermont

Armed with a list of video titles named most often by the children, I requested the films at my local video stores. These tapes--that glamourize and promote criminal acts such as prostitution, extortion, blackmail, and incest--are also available in your neighborhoods:

1. Debbie Does Dallas - 1 High school cheerleaders need funds for a school trip. They decide to raise the money by prostituting with the town fathers. Explicit hardcore porn.

2. Debbie Does Dallas - II  A female cheerleader performs oral sex on the football coach immediately after he sodomizes her. This is hardly a role model for safe sex as a nation is girding itself against the onslaught of AIDS!

3. Little Girls in Blue  A young girl in private school gets an "F" on a test, then visits the teacher, performs oral sex, thereby coercing him into changing the "F" to an "A."

4. Taboo I, II, III, IV, V  The long waiting lists made these "most popular" films difficult to obtain. Dealing almost exclusively with incest, scenes include a father having sex with his daughter, then reciting the wedding vows and a mother praying at the bedside before having sex with her son to soft musical *lyrics:

I

I should turn, walk away,
Run and hide.
But right here, I'd rather stay
By your side.
Don't know why I feel so strong
Deep inside.
Don't be afraid.

II

Here,.....................so long,
Let you know
I got passion deep in my heart
Gotta let go.
Can't hold back, now don't you see,
I need you now.
All those mothers, with destine to be
Right here, right now.
Don't be afraid.

III

Take me by the hand,
Lead me through the door,
Know you'll understand
We have something more.
And I hope and I pray,
You'll feel the same way.
I've loved you for a lifetime
And even more. And even more.

IV

If you're lost deep in the night,
Just call my name.
Forgive what's wrong, what's right,
With no one to blame.
When the moon glows, in your arms
I feel no shame.

Take me by the hand..........

DATELINE: Chigago, Illinois

Two arrests covering a span of 10 years illustrates the escalating intensity of pornography, particularly child porn. The first arrest dealt with the publication, HERMES (which we at "60 Minutes" uncovered in 1977, during an investigation for Kiddie Porn. (The same presses that printed official FBI materials by day, ran off HERMES by night.) Editor Gerald Jones advised his pedophile subscribers:

> ".....There are many satisfying ways of making contact with boys, ways which are not only socially approved, but encouraged! Big Brothers, Boy Scouts, church groups--the list of organizations goes

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*Lyrics are incomplete as audibility was often impossible.

> on....Whether or not you have a criminal record or other problems in your past, there is very little chance that anyone will ever know of your interests or check into your background....Don't give up!..."

In 1987, U.S. Customs agents in Chicago arrested Peter Stoso, whose bizarre publication, PURE, was a cover-up for an international distribution ring of child pornography. Its writings also included Satanism and Nazism. Following is an excerpt from one PURE editorial:

> "Child abuse is a sublime pleasure. All the great extremes--genital torture, forced unlubricated rape, butchering; all these pleasures and more reach their pinnacle when the victim is a small child. The orifices are extremely tight and usually virgin, an absolute joy to mangle, rip, and violate. The pained screams ring more shrill, more impassioned, unhampered from years of growing up fat and jaded. Virgin territory brings the fresh cries and intense reactions of crushed and forever retarded innocence.
>
> There is an added pleasure in child torture, a pleasure that lives on even after the child lay (sic) dead and rotting. Parents. The pain of the parents allows the libertine to forever enjoy his crimes. Little kidlings are precious to parents, their lives become meaningful and important because of the little bundle of love that bounces on their knees. Their grief and sense of loss is immense when their tiny god's gifts are destroyed. Their entire lives crumble and break. An excruciating pain that becomes omnipotent as the child's memory is rendered burdensome due to the brutality and masterful eloquence of the dominant."

DATELINE: Washington, D. C.

The United States Justice Department and customs and postal inspectors successfully concluded a sting operation in 1987. More than 100 adults were arrested for child porn. As many as 35 men, representing a cross-section of white and blue-collar (see attached list of occupations) workers, were accused of actual sexual molestation.

Even as the porn industry echoes the argument of the tobacco industry 10 years ago--"The cause and effect have yet to be proven"--the fact is, pornography has weakened the moral brakelining of this country. It fuels the fires of the basest human desires. Those who cannot differentiate between fantasy and acting out for instant gratification are swept away in destructive behavior with criminal intent. Child molesters, including incestuous family members, are acutely aware of the stimulating effects of pornography, and by coercion or force, use it with their intended young victims. "TABOO-V," which glamourizes incest, rated 35th among the top 100 video sales in Jan., 1987 (West Coast Video Top 100.) Coincidentally, sexual abuse by fathers and stepfathers now accounts for 50% of all sex crimes committed in the home.

The House Select Committee on Children, Youth and Families reported that sex abuse of children increased by 176.5% between 1980 and 1985.

Before I close, I would like to propose an amendment to this legislation which would extend the statute of limitations for pornography-related crimes against children. It becomes increasingly clear that the majority of these victims remain silent because of threats from their perpetrators or because of self-imposed feelings of guilt. It is not until adulthood that they intellectualize the enormous physical and emotional damages wrought on them.

In a 1987 case (Mire vs. Gauthe #86-52437, Vermillion Parish District Court,) a married man was awarded $1.8 million for sexual crimes committed against him by a Catholic priest when he was an altar boy. The case was won on the "theory of law that the clock starts ticking only once you are aware of the harm." We must make the hardcore pornography industry--from financial backers, producers, distributors, and dealers to the supportive consumers--responsible to the victims of today who, five to ten years after they come of age, will require redress for the harm done today by the pornographer/molester.

I implore the Congress to withstand political pressures from the porn PACS and support Sennate Bills #2033 - Child Protection & Obscenity Enforcement Act and Bill #703 - Pornography Victims Protection Act of 1987. Surgeon General C. Everett Koop sent a message to every home in America, warning us how to avoid contracting AIDS. Would it not be a contradiction if the Congress were to allow these bills to die and consequently, passively allow our children, some as young as elementary age, to watch material that is in direct conflict with life-saving information Dr. Koop has provided the general public? The Russian poet Yevtushenko once said, "What times are these that a simple statement of truth becomes an act of great moral courage?" By voting for Senate Bills #2033 and #703, you will make simple statements of truth for 63 million Americans who are children.

Kenneth Wooden
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## OPERATION BORDERLINE

### LIST OF SUSPECT'S OCCUPATIONS

| CPRI # | Occupation |
|---|---|
| 4980 | Butcher |
| 5083 | Police officer |
| 5489 | Dentist |
| 283 | Job service representative |
| 1181 | Shrimp fisherman |
| 9490 | Funeral home owner |
| 9496 | Attorney |
| 9497 | Attorney (suicide) |
| 9898 | Computer installer |
| 9499 | Truck driver |
| 9500 | Foreign car repair shop owner |
| 9501 | Factory worker |
| 9503 | Schoolteacher |
| 9504 | Food service trainee |
| 1474 | Utilities worker |
| 9506 | Chemical company employee |
| 9515 | Hair salon owner |
| 9516 | Retired |
| 9192 | Retired |
| 9516 | Navy civilian employee |
| 9520 | Sales representative |
| 9521 | Farmer |
| 9539 | Policeman/juvenile probation officer |
| 9543 | Maintenance worker |
| 9548 | Music teacher at college |
| 9550 | Foreman- state Dept. of Trasportation |
| 9553 | Retired police officer |
| 9555 | School librarian |
| 9556 | Welding and machine company owner |
| 9557 | Video producer |
| 9559 | Electrician |
| 9561 | Structural engineer |
| 9562 | Carpet sales/installation |
| 2220 | Retired |
| 9566 | Attorney |
| 9568 | Machinist |
| 9570 | Salesman |
| 9572 | Enlisted- U.S. Navy |
| 9574 | Engineer |
| 4111 | National Weather Service employee |
| 9577 | Shipping clerk |
| 9579 | Marketing analyst |
| 9583 | Janitor |
| 9585 | Detention ctr. employee/Boy Scout leader |
| 3323 | Service station attendent |
| 9590 | Film distributor (self-employed) |

| | |
|---|---|
| 9592 | Railroad inspector |
| 4427 | State auditor |
| 9596 | Draftsman |
| 2948 | Electrician |
| 9598 | Bar operator |
| 9599 | Graphic artist |
| 9600 | Video engineer |
| 9604 | Graphic artist |
| 9605 | Retired truant officer/fmr. scout leader |
| 9613 | Musician/salesman |
| 9856 | Bartender |
| 9542 | Parole/probation officer- |
| 10176 | Salesman |
| 10193 | Caretaker |
| 10207 | Baker/maintenance worker |
| 10343 | Paper company/manager |
| 10344 | Bank courier |
| 10345 | Electrician |
| 10757 | Musician |
| 10758 | Electrical technician |
| 9537 | School bus driver |
| 10762 | Nurse/attendent |
| 10770 | Salesman |
| 10775 | Waterfront cargo worker |
| 9552 | Dentist |
| 4168 | College professor |
| 10788 | Loan officer |
| 5899 | Factory worker |
| 10832 | Police officer |
| 9513 | Actuary |
| 1806 | Machinist |
| 2075 | Payroll auditor for newspaper |
| 2679 | Housepainter |
| 10992 | Defense contractor |
| 10993 | Food service worker |
| 10622 | Factory worker |
| 10997 | Bingo hall manager |
| 9524 | Plumber/U.S. Army reserve |
| 10998 | Railroad employee |
| 11169 | Epidermologist/university consultant |
| 9594 | Food store manager |
| 723 | Strategic planner- oil corporation |

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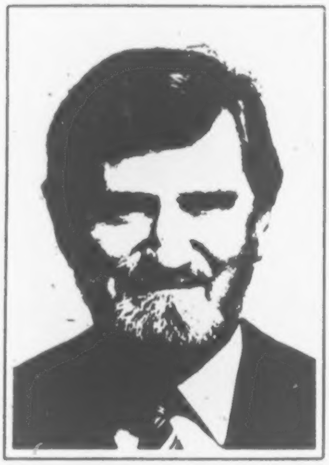
88 - Total number of recorded suspects with occupations listed in U.S. Customs CPRI records. This information was compiled from available data gathered during the U.S. Customs child pornography enforcement program named "Operation Borderline". The total number of individuals investigated in Borderline is two hundred. Therefore, this occupational data reflects approximately 44% of the total operation.



Ken Wooden researched and wrote this Family Guide as an outgrowth of his work as an investigative reporter for CBS Sixty Minutes, NBC News, ABC News 20/20 and as the founder of the National Coalition for Children's Justice and the National Child Victim Network. The information is based on interviews with convicted child molesters, murderers, pimps, and drug dealers—the "experts."

Trained as an educator, Wooden has written two books on injustices suffered by children. "Weeping in the Playtime of Others," a best-seller, served as the basis for three Sixty Minutes segments. "The Children of Jonestown," the culmination of his investigative work for NBC News and the Chicago Sun-Times, garnered a Pulitzer Prize nomination.

Wooden's articles and books have prompted Congressional inquiries and legislation dealing with interstate commerce of children, the child pornography industry, foster care reform, the problem of missing and murdered children, and most recently, ritual abuse and Satanism.

## National and International Awards

***Children's Express Juvenile Justice Awards***
The White House, 1979

***Kenneth David Kaunda Award for Humanism***
The United Nations, 1980

***Doctor of Humanities***
Glassboro State College, 1982

***The Public Spirit Award***
American Legion Auxiliary, 1986

***The Giraffe Award***
*(Sticking one's neck out for the Common Good . . .)*
The Giraffe Project, 1986

***Distinguished Contributions to the Cause of Child Advocacy***
The American Psychological Association, 1986

## Former Investigative Reporter/Co-Producer, ABC News, 20/20

"They're Murdering Our Children"
"The Lures of Death"
"The Best Kept Secret"
"Can They be Caught?"—Exclusive interview with Henry Lee Lucas, mass murderer
"Brainwashing"
"The Devil Worshippers"—Satanism in America

> *"You were the first voice to ring the alarm on the rising violent death of our children. Your research, writings, and training of police officers and anyone else who would listen, was at first, the voice in the wilderness, the pioneer who would not give up."*
>
> John Walsh
> Adam Walsh Child Resource Center

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Senator DECONCINI. Thank you.

Just for the record, when you say "ripped off," you mean sexually abused.

Mr. WOODEN. Sexually exploited.

Senator DECONCINI. Or molested and exploited.

Mr. WARD. Sexually exploited, yes.

Senator DECONCINI. Thank you.

Ms. Lavery.

## STATEMENT OF CAROL L. LAVERY, EXECUTIVE DIRECTOR, VICTIMS RESOURCE CENTER, WILKES-BARRE, PA

Ms. LAVERY. I appreciate the opportunity to come before you today to address the issues of pornography, and specifically the Pornography Victims Protection Act of 1987. I am the executive director of Victims Resource Center, which is located in Wilkes-Barre, PA. We serve a two-county area, providing assistance to approximately 600 clients and doing educational programs in the schools of approximately 600 annually.

I have been working in the field for 15 years, and I also am a past President of the Pennsylvania Coalition Against Rape, which is a State-wide organization providing technical assistance to rape crisis centers.

Only within the last 10 years has attention begun to focus on the relationship of pornography to sexual abuse and exploitation. Studies and theoretical dissertations are conflicting and unconclusive, yet certain facts are undisputable. Violent crime is increasing; child abuse has become a national tragedy; and at the same time, pornography has become a multi-million dollar business.

Over the last 15 years, we at VRC have experienced through the annual 450 cases of sexual abuse and assault victims served, a substantiation of those theories that link violent pornography with rape and sexual abuse, and kiddie porn to child and sexual abuse. At least one-half of the sexual assault cases and sexual abuse cases seen at our organization relate pornography as a part of that victimization experience. The numerous examples of these situations point out the patterns that emerge in the use of pornography by abuses to initiate the abuse, to progress into other forms of abuse, or as a form of abuse itself.

In deference to time, I was not going to go through some of the cases that I have in my paper here today. But after hearing some of the earlier testimony, I feel it is very necessary to do that.

Senator DECONCINI. We would welcome putting your paper in, the full statement. I would like to have those examples.

Ms. LAVERY. Okay. The examples do show a progression and do show a relationship between those situations that occur with child sexual abuse and pornography and adult abuse. Just to go through a few of those—and these are cases that were just initiated within the last year in our organization. Three young children are currently undergoing counseling following numerous incidents of fondling by a school bus driver. The abuser also took nude photos. None of those photos were recovered. A 15-year-old child was photographed by a teacher in the bathroom of her school. A young adult woman initiated services at our organization due to ongoing telephone harassment. Counseling revealed that the harassment centered on the fact that she had stopped the videotaping of pornographic pictures of her younger sister.

All of the above situations involved victims with special needs. All are mentally disabled. Because of this disability, they were unable to fit the legal standards for witnesses during a criminal prosecution. Although they were willing to prosecute, no legal resource was open to them or to their families.

Progression in terms of victimization can be documented in many cases. This includes the 20-year-old woman who lived for a time with a violent individual, was forced to act out bondage and sadistic situations depicted in his pornography collection. A 29-year-old woman who is now receiving services was photographed in the nude after she had passed out due to intoxication. The individual who set that situation up and subsequently took pornographic pictures of her is currently circulating those pictures among their mutual friends. Efforts by police to end this have only brought harassment charges and a fine. Her family has been affected. On Election Day, when her father was running for office, this individual brought those pictures to the polling places and shared those with people who would look at them.

Many women and children are forced or tricked into situations and fear retaliation by the pornographer or by abusers. A woman undergoing counseling fears prosecution by local police for prostitution or related charges. Her ongoing abusive relationships included taking nude photos of her and group sadistic photographs with many of the abuser's friends, including a number of local police officers.

There are many, many cases that I could go on and list, and I think one of the important things to put this in perspective is to realize that Wilkes-Barre, PA, and the surrounding areas is considered one of the most highly valued places to live because of our extremely low crime rate. And the amount that occurs in this particular area is very, very high despite that fact that we do have a low crime rate.

A concern for the existence of pornography was expressed by a large number of parents—this is my last case—that were contacted by local police after the discovery of a large number of pornographic pictures in the collection of a local child pornographer. Included were pictures of these parents' children. During the investigation it was determined that the pornographer had created these photos by superimposing pictures of the faces of some children over pornographic pictures of other children. The parents' anxiety increased after the discovery of lists of names of individuals with whom this pornographer had shared those photographs.

After the abuse is discontinued, pornography remains a lifelong evidence of the abuse. Unrecoverable, uncontrollable, reinforcing and prolonging the negative feelings of guilt, shame, and degradation. The long and slow recovery process is hindered by issues surrounding the pornography. The sense of victimization is extended to others, real or imagined, viewers of that pornography.

Victims wonder: Where are those pictures and who is seeing them?

The trauma of victimization can best be expressed as helplessness and loss of control. What is lacking for most victims, including victims of pornography, is an individual or personal remedy within the court system. The Pornography Victims Protection Act of 1987 provides some important options not currently available.

First of all, the remedies would at minimum provide symbolic——

Senator **DeConcini**. Ms. Lavery, would you please finish up?

Ms. **Lavery**. Okay. I will finish up real quickly—provide a symbolic function of a law that shows that it is wrong to actually use victims in this way. I think the ability of a victim to seek an injunction, the fact that hearings can be closed, and the fact that a 6-year statute of limitations is there is very, very helpful to victims.

I would strongly support the passage of the legislation.

[The prepared statement of Ms. Lavery follows:]

# TESTIMONY OF

CAROL L. LAVERY

BEFORE THE

JUDICIARY COMMITTEE

OF THE

UNITED STATES

SENATE

JUNE 8, 1988

I appreciate the opportunity to come before you today to address the issues of pornography and the Pornography Victims Protection Act of 1987. I am the Executive Director of Victims Resource Center which is located in Wilkes-Barre, Pennsylvania. In my fifteen years experience as a founder and then Director of VRC, I have been able to observe and participate in the social trends that have taken us as a nation through our concerns for victims of rape, domestic violence, child abuse, and victims of pornography. In addition to my work on a local level I am a founder and past President of the Pennsylvania Coalition Against Rape which has served as a model statewide program providing technical assistance and legislative action relating to the issues of rape and sexual abuse. Throughout the last fifteen years I have counseled hundreds of victims, worked to develop community networks responsive to the needs of victims, provided technical assistance to other centers, and presented hundreds of public and professional educational programs on a local and state level.

During this period of time Victims Resource Center has developed from a grassroots volunteer rape crisis center into a victim/witness program serving victims of all crimes over a two county area with a population of 350,000 people. Over 600 clients are served and over 500 educational programs presented annually.

Only within the last ten years has attention begun to focus on the relationship of pornography to sexual abuse and exploitation. Studies and theoretical dissertations are conflicting and unconclusive. Yet certain facts are undisputable. Violent crime is increasing. Child sexual abuse has become a national tragedy. At the same time pornography has become a multimillion dollar business.

Over the last 15 years, we at VRC have experienced through the 450 sexual assault/abuse victims and their families members served annually, substantiation of the theories linking violent pornography with rape and sexual abuse; and "kiddie porn" to child sexual abuse. At least one half of the sexual abuse and assault victims seen at VRC relate pornography as a part of their victimization experience. The numerous examples of these situations point out the patterns that emerge in the use of pornography by abusers to initiate the abuse, to progress into other forms of abuse, or as a form of abuse itself.

A review of VRC sexual abuse cases initated in the last year provides the following examples and a sense of the extent and depth of the problem.

Three young children are currently undergoing counseling following numerous incidents of fondling by a school bus driver. The abuser also took nude photos of the three children. None of the photos were recovered during the criminal investigation of these incidents. Another fifteen year old child was photographed by a teacher in the bathroom of her school. A young adult woman initiated services at VRC due to on-going telephone harrassment. Counseling revealed that the harrassment centered on the fact that she had stopped the videotaping of pornographic pictures of her younger sister. All of the above situations involve victims with special needs. All are mentally disabled. Because of this disability they were unable to fit the legal standards for witnesses during a criminal prosecution. Although they were willing to prosecute, no legal recourse was open to them or their families.

Progression in terms of victimization can be documented through many cases. This includes the 20 year old woman who lived for a period of time with a violent and abusive man. She was forced to act out bondage and sadistic situations depicted in his pornography collection. She continues to suffer on-going harrassment by this individual long after her break from him, and lives in fear of his threat to circulate the pornographic pictures he took of her. A 29 year old woman who is receiving on-going counseling at VRC was photographed in the nude after she had passed out from intoxication. The individual who set up the situation and took the pictures carries them with him circulating them among their mutual friends. Efforts by police to end this have only brought harrassment charges and a fine. Her family has also been deeply affected. On election day while her father ran for political office, the abuser stopped at polling places "sharing" the pictures with those who would look.

Many women and children coerced or tricked into these situations fear retribution by the pornographer/abuser or by others. A woman undergoing counseling, fears prosecution by local police for prostitution or related charges. Her on-going abusive relationship with an abuser included taking nude photographs of her, pornographic films acting out sadistic sexual activities, and group sadistic photographs with many of the abuser's friends including a number of local police officers.

Two young boys, ages 14 and 15, developed a friendship with a man who took bondage photos in his "torture chamber", set up for the pornographic films. After a year of on-going abuse, the situation escalated into forced prostitution of the boys. The abuser was arrested for parole violation after disclosure by the boys. The police confiscated the equipment and bondage paraphernalia. Few of the photos were recovered.

Children who are most vulnerable often progress into additional sexually abusive situations. Many of the low income preteens who posed for pornographic pictures in exchange for money, by a neighborhood man, felt that his promise to take the pictures of their nude bodies, cutting of their heads in the photographs, was a legitimate promise.

A father and son team perpetrated severe and on-going violent abuse on a group of four neighborhood children. One of the victims, a child with a mental disability, was photographed. None of the photographs were recovered during investigation. All of these children suffer severe mental health problems including suicidal tendencies. Some have begun prostitution.

Two cases involved abuse by "caretakers". A counselor in a teenage group home was recently prosecuted for on-going abuse of two teenage girls living in the home. He introduced them to drugs and alcohol, took pornographic pictures, and then graduated them into prostitution by threatening them with the pictures. He played on their fears of arrest and institutionalization, the next step beyond the group home. Only a few of the pictures were recovered during police investigation.

A local governmental employee dealing with low income clients was recently fired for coercing his clients into numerous sexual activities including pornography and prostitution.

Often the existance of the pornographic pictures is an on-going crisis for the victims. A women raped at knifepoint was also forced to dress in costume and dance while pictures were taken by the rapist. The wife of this offender, after his arrest, reports numerous situations where he would force her to dress and dance while he took photos. None of the photos of the rape victim nor the offender's wife were recovered by the police. In another case involving this same rapist, he forced his victim to act out sadistic situations depicted in the pornography he had in his possession during the time of the assault.

This same concern for the existance of the pornography was expressed by a large number of parents who had been contacted by police after the discovery of a large number of pornographic pictures in the possession of a local child pornographer. Included were pictures of these parent's children. During the investigation it was determined that the pornographer had created these photos by superimposing pictures of the faces of some children over pornographic pictures of other children. The parents' anxiety increased after the discovery of lists of names of individuals with whom the pornographer had exchanged photos.

While the debate rages on concerning the existance of a causal link between pornography and violence toward women and children, those of us who work on a daily basis with victims of abuse have no doubt about the strong central role pornography plays in the cases of on-going abuse. Case after case such as those listed above can be cited which demonstrate that central role. In the majority of child sexual abuse cases receiving services at VRC, pornography is evident. The sexual victimization is either normalized by the abuser through the introduction of the child to the sexual acts through pornographic magazines and pictures, or pornographic pictures are taken of the children. In adult cases of physical and sexual abuse, victims report the taking of pornographic pictures as part of the on-going abuse. Often the progressive sadistic acts in these cases involve the acting out of scenes depicted in pornography. Virtually all of the abusers in these cases are heavy users of pornography.

The taking of pornographic pictures has a profound effect upon victims as reported by VRC clients. The creation of a tangible history of the abuse through the pictures compounds the guilt, shame, and degradation of the forced sexual activity. The pornography becomes a central issue in the continuation of the abuse as it represents the "secret" of the abuse - shared by the victim and abuser - and is often used to blackmail or further control the victim into continued submission.

After the abuse is discontinued, the pornography remains as lifelong evidence of the abuse, unrecoverable, uncontrollable - reinforcing and prolonging the negative feelings of guilt, shame, and degradation. The long and slow recovery process is hindered by issues surrounding the pornography. The sense of victimization is extended to others, real or imagined viewers of the pornography. Where are the pictures? Who has seen them?

The trauma of victimization can best be expressed as the helplessness and loss of control experienced by victims during the abuse and violence. These feelings are compounded by a criminal and civil justice system that lacks empathy and sympathy for individual victims. The victim recovery process must focus on rebuilding and regaining control. Bringing criminal charges and cooperating in the prosecution are often a step in this process. But what is lacking for many victims including pornography victims is an individual or personal remedy. The Pornography Victims Protection Act of 1987, S703, provides these victims with important options currently unavailable.

First, the new remedies would at minimum provide the symbolic function of a strong and clear statement that forced, intimidating and fraudulant manipulation of any person into producing pornography is wrong - unjust - and that the victim has been personally injured and, as such, entitled to compensation.

The ability of the victim to seek an injunction to stop the distribution of the pornography is of major importance to victims. When the abuse is over, the victim has regained control on a tangible level.

The legislation contains provisions which are obviously atuned to victims' needs, and therefore increase substantially the cooperation of victims in the initiation of civil or criminal actions. The possibility of closed hearings is always a concern of victims in their decision to seek court action. The provision which creates an extended period of time allowing victims to initiate civil actions up to six years after the incident or six years beyond the maturity date of a child, is sensitive and realistic. This time period enables victims to build the necessary strength required to participate in court processes.

The ability of a victim to remain anonymous while becoming the recipient of monetary compensation as a result of court action brought by the Attorney General against the pornographer, is a key factor which enables victims to access their new legal options.

The proposed legislation S703 is a step in the direction of curtailing pornography. It is also a valuable tool in returning the victim's sense of power and control lost through victimization. A great deal of reform needs to be done within the criminal justice system to balance the rights of victims against the rights of the defendant. This legislation which grants the victim both the power to halt the distribution of pornographic material and to seek monitary retribution is a substantial step in that direction. Power and control is the basis of victimization and therefore becomes the central focus of a victim's steps toward recovery. The Pornography Victims Protection Act of 1987 will provide the victim with additional steps necessary to regain the control lost during victimization. In addition, since pornography is a business which will be affected by monitary fines, the legistation is a step in the direction of regulating an industry that currently defies control.

Senator DECONCINI. Thank you very much. Any further testimony that any of the witnesses want to submit besides the questions that we might ask you to submit to, we would be happy to have it for the record.

Ms. Gallery, we want to thank you very much for taking the time to be here with us today. The events and circumstances on which you are about to testify are most tragic. The committee appreciates your willingness to share those things with us. I regret the time limitations here, but would you please summarize what you have for us. Any other details or other information we welcome for the record. Please proceed.

## STATEMENT OF DIXIE L. GALLERY, DENVER, CO

Ms. GALLERY. Thank you for the opportunity.

We hear so often that pornography is a victimless crime. Perhaps my story will help to convince some of these people who believe this that it is not true. The fact is pornography has many victims. It not only victimizes those who are caught in the sordid world of murder, rape, drugs and prostitution, but it victimizes innocent children and those of us who feel that our lives will never be touched by these people who are a part of a world that we do not know or have never been associated with.

The unfortunate facts are, however, that we are not safe from these people. At some point in your life, you or a loved one, a special friend or acquaintance will most likely become a victim. This is why we have to convince those who say pornography is a victimless crime that it is not so. Let me tell you about a beautiful, 22-year-old college student who had her whole life ahead—my daughter, Linda Daniels.

Linda was a petite, 5-foot-2 inch, blue-eyed natural blonde. From the time she was just a little girl she loved to read and go to school, listen to music, and she loved cats. Linda was very bright and was identified in school as gifted and talented. She was above average and capable of doing anything she set her mind to do. She was a varsity cheerleader for 3 years in high school, carried a 4.0 grade point average, and had earned three college credits before graduating from high school.

Linda attended Colorado State University for 2 years before transferring to the University of New Mexico in Albuquerque in January 1985 where she wanted to major in anthropology. She was extremely happy at UNM and had made many friends; she met a wonderful boyfriend and planned to be married after graduation.

Linda had been home for Christmas just 3 weeks before her abduction. We had a great time at Christmas. She had spent a week at home and was anxious to get back to Albuquerque to her boyfriend so she could spend New Year's Eve with him. I will always remember seeing her in line at the airport waiting to get on the plane. She was happy and smiling and everything was great. That was the last time I saw her alive.

I had talked to Linda a couple of times after she returned to Albuquerque. Then I got the call on Sunday, January 12, 1986, about 11:30 p.m. telling me that they thought Linda had been kidnaped. I could not believe it. This could not be happening, but it was true.

And we arrived in Albuquerque from Denver the following morning.

Linda was abducted from the driveway of her boyfriend's parents home after coming home from grocery shopping in a very nice section of Albuquerque. The whole incident occurred because one perverted, sick man, age 44, wanted a girl, or a "product" as he referred to them, preferably a blonde, to be used in a pornographic movie.

The four men involved in this horrendous crime were caught and brought to trial, and they are currently serving sentences. According to testimony at the trial, the 44-year-old, named John Zinn, told three young acquaintances of his that if they would find him a "product" for a pornographic movie, he would give them $1,500. He told them to tell the girl that she would be taken to Farmington, NM, where she'd live in a large place, she would have all the clothes and drugs she wanted, and she would be driven around in limousines. This information was given at the trial by two girls who had been approached by Zinn to be in pornographic movies, and they had refused. I might add that one girl was 16 years old that testified.

The three men roamed the streets day and night prior to Linda's abduction looking for a willing participant to be in a pornographic movie. When they could not find anyone willing to do what they asked, which included among other things performing sexual acts with animals, they decided they would just have to grab someone off the street. Actually, Zinn ordered the three guys to "grab someone off the street."

By this time, it was Sunday, January 12. The three men gathered the necessary items—TV wire to tie her up, bandannas for a blindfold, a Polaroid camera for pictures, a syringe, and a bottle of pills. They set out driving around the city. They spotted one lady and followed her to her home. Fortunately, she had a garage door opener and drove straight into her garage. I might add here they also had spotted a 12-year-old girl walking down the street, and they just were not able to grab her in time, is basically what happened. As the witness testified, they could not act fast enough to grab her. She was only 12 years old.

So they went back to a grocery store parking lot where they were just waiting to see someone. When one of the guys saw Linda drive in, they saw her long blonde hair and they said, "There, that is the one we want. The boss likes blondes." So they waited for her to finish her shopping, and when she didn't come out when they thought she should, one actually went in and looked for her and then followed her out of the grocery store.

So she came out, got in her car, and they followed her back to her boyfriend's house. She drove in the driveway, and they went to the end of the street and turned around and came back where she was unloading her groceries, and two of the three guys jumped out of the car and grabbed her and pulled her into the car.

From there they took Linda to the motel where they gave her drugs and alcohol, raped her repeatedly and took pornographic pictures of each one raping her. This continued all night long.

The next morning, it was in the newspapers that Linda was missing. Because John Zinn knew Linda could identify them, he ordered his three partners to "get rid of her." So they drove her to the mountains, and while she pleaded for her life, one of them shot her in the head.

Why did this happen? Because one perverted, sick man wanted a "product" for a pornographic movie.

You always think something like this is never going to happen to your family; we were the all-American family. Pornography and drugs and the crime that goes on all the time only happens to the "low-lifers," or people who "ask for it" by the way they live, people like drug users, prostitutes, alcoholics. This is not the case at all. Ours was the all-American family. Linda was the all-American girl. She had something to offer society, and yet her life was taken by animals that roam day and night looking for victims.

When something like this happens to your own family, when you lose a daughter because of this element in our society, you suddenly wake up and realize how blind you have been and how you tend to "brush things under the carpet," so to speak. You think, well, pornography is bad, but I do not buy it or look at it. It really does not affect my life. Why should I worry about it or do anything about it?

When something like this happens to you, it is like the light has been turned on and you start finding out that pornography does affect all of us. And as you read the daily newspapers, you generally can find an article about child molestation, sexual abuse, rape, et cetera; and in most cases some form of pornography or child pornography has been involved. Before it happens to you, you think, "Oh, that is terrible" and you just turn to the next page of your newspaper. After it happens to you, your heart is broken and you know the pain that the child and that family is suffering. And they are suffering because no one has taken the time to care and rid our society of pornography.

All I know is that my daughter would be alive today if it were not for a sick mind wanting a "product" for a pornographic movie. The unfortunate fact is we need more people to care and more people to take a stand.

Criminals seem to have more rights now than the victims. We must remember we have rights, too, and we must fight to keep our rights. Linda had a right to live. I had a right not to have these animals take my daughter away. It is our right to live in a society that is not overrun with pornographers, rapists and murderers.

We must protect our children. If we do not, who will? It is too late for my daughter, but it is not too late for yours.

Senator DECONCINI. Ms. Gallery, thank you very much. I have two daughters and a son, and anyone who has children, and even those who do not have children, have to be greatly moved by the pain and suffering you have been through, and then my great admiration for being willing to share it with others because it is truly unfortunate for you and your family and deceased daughter, a real experience that no one can really appreciate in the fullest sense. But it certainly spells out the problem that we are attempting to face. As Mr. Wooden says, where have we been for 11 years? I cannot help but think how many other victims there have been, both the families and the actual person who has been dragged into it, as you point out.

I deeply appreciate your sharing this with us. It is helpful to us, and I hope that my colleagues and those who oppose this legislation, if they have nothing but opposition and no other solution, then I hope they think long and hard about your particular case and other examples that have been given.

Ladies and gentlemen, I am going to ask if you would be so kind as to answer some questions for us. We have run out of time, and I have a number of questions regarding the legislation. Mr. Taylor, your prosecutorial experience certainly precedes you here. You are well known to this Senator, and you might be able to help us clarify the record as you did with your testimony. We thank you very much for your testimony and your participation today.

The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 12:43 p.m., the committee adjourned subject to the call of the Chair.]

# APPENDIX

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STATEMENT OF PEGGY M. COLEMAN
LEGAL COUNSEL

AMERICAN FAMILY ASSOCIATION

ON

S. 2033

BEFORE THE
COMMITTEE ON THE JUDICIARY
OF THE
UNITED STATES SENATE

American Family Association/Post Office Drawer 2440/Tupelo, Mississippi 38803/Phone 601-844-5036
Fax Number 601-844-9176

## I. Introduction

The Child Protection and Obscenity Enforcement Act of 1988 contains provision that will strengthen existing laws and will allow law enforcement efforts to be more effective. For the most part, existing federal obscenity laws are more than adequate, when enforced, to curb the interstate flow of obscene material. The major highlights of the bill include provisions that would permit forfeiture in obscenity prosecutions, a recordkeeping provision imposed upon producers of certain types of sexually explicit material, and a prohibition against the distribution of obscene material on cable or subscription television.

Many of the provisions of this bill were based upon recommendations issued by the Attorney General's Commission on Pornography. A more in-depth legal analysis, as well as support for the underlying premise for each legislative proposal can be found in The Final Report of the Attorney General's Commission on Pornography.

The provisions of this legislation have been carefully examined and are well within the constitutional limits of Congress' authority. The American Family Association strongly supports this legislation and urges this Congress to act swiftly in passing it.

## II. Section-by-Section Analysis

The following is a section-by-section summary analysis of S. 2033, The Child Protection and Obscenity Enforcement Act of 1988.

Section 101.

This section specifically prohibits the use of computers as a means of transmitting information about or advertisements of child pornography.

The prohibition against the use of computers to distribute child pornography is merely an attempt to afford children the degree of protection that was originally intended in light of advancing technology. Computers are used by purveyors of child pornography to advertise materials, identify locations where prospective child victims may be found and to transmit sexually explicit visual depictions of minors.

Section 102.

Section 102 essentially prohibits the buying, selling, or trading of minors for use in the production of sexually explicit material. [1]

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[1] While the focus of §2252 is on the production and distribution of visual depictions of minors engaged in sexually
(Footnote Continued)

This section prohibits the transfer of minors by those who have knowledge that the result of the transfer will be visual depictions of sexually explicit conduct or the custodian intends to promote a minor engaging in sexually explicit conduct for the purpose of producing a visual depiction.

This section mirrors the import of 18 U.S.C. §2421 which prohibits the interstate or foreign transportation of any person for the purpose of engaging in sexual activity. The proposed amendment would specifically prohibit the actions on the part of parents or legal guardians who intentionally offer a child within their control and custody for use in producing child pornography.

Section 103.

Section 103 imposes a recordkeeping provision on producers of material containing actual sexually explicit conduct. The provision requires producers to obtain and maintain identification information about each performer appearing in sexually explicit material. There are two important features in section 103. First, the provision states that the information

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(Footnote Continued)
explicit conduct, a reasonable and more effective amendment would prohibit the "sale, purchase or trading of minors for illegal purposes." This prohibition would include the interstate trafficking of minors for purposes of prostitution.

required cannot be used as evidence in proceedings against the individual-recordkeeper for any violation of the law except a violation for furnishing false information (See, 18 U.S.C. §1001). Second, the provision includes a rebuttable presumption that arises in a prosecution for a violation of 18 U.S.C. §2251(a). If the recordkeeper fails to maintain the required records or to affix the appropriate notice on each copy of the material the rebuttable presumption is raised that all performers appearing in the material were minors.

This section also uses a definition of "actual sexually explicit conduct" which provides the basis for recordkeeping obligations. This phrase means actual--

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or
>
> (E) lascivious exhibition of the genitals or pubic area of any person.

This provision eliminates the need to keep records regarding visual depictions of sexually explicit conduct in which the conduct is simulated rather than actual. [2]

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[2] An alternative to this specific provision would require recordkeeping and merely imposed criminal sanctions on those who fail to maintain the records. This alternative was essentially (Footnote Continued)

This recordkeeping provision is fully justified on the basis that it is designed to afford protection to individuals who participate in potentially hazardous and deadly work. As outlined in the Final Report of the Attorney General's Commission on Pornography, individuals who are used in the production of sexually explicit materials are often young. [3] These young men and women are exposed to a variety of sexually transmitted diseases and other physical dangers that are unique to work in the production of sexually explicit material. [4]

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(Footnote Continued)
the recommendation of the Attorney General's Commission on Pornography.

[3] See, Final Report 855-856 (1986) ("Perhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth. As one law enforcement officer who has extensively investigated the production of commercial pornography told us, 'they [the producers] are looking for models that look as young as possible. They may use an eighteen-year-old model and dress her up to look like she is 15.' Female modes appearing in 'mainstream' commercial pornography appear rarely to be over thirty years old or even in their late twenties; indeed, most whose age we have been able to gauge began their careers in their late teens. Indeed, one former model who now works in the front office of an 'adult' video company explained her decision to retire thus: 'Good roles for women over nineteen years old have become few and far between.'").

[4] See, Final Report at 872-73 (1986) ("Precisely because sex is their job, models face health hazards of forbidding intensity. Working three to four days a week, with two sex scenes each day, any one model may have twenty-four to thirty-two different sexual partners every month, just through work. Even though some performers state that they receive regular medical check-ups, the odds of contracting sexually transmitted diseases are very high--particularly because performers do not even have the option of using condoms or other 'safe sex' techniques. Not surprisingly, even the rumor that a model is infected with a sexually transmitted disease can ruin his or her career, but just as obviously such a rumor will often fail to spread before the
(Footnote Continued)

The recordkeeping provision will not otherwise infringe upon a person's ability to engage in such activities, but it will afford greater protection to those who do participate. This amendment should not be read as a "stamp of approval" issued by the government as to the materials themselves. The recordkeeping provision is merely a mechanism designed to protect individuals who engage in certain hazardous activities.

Section 104.

Section 104 adds violations of 18 U.S.C. §§2251 and 2252 to the list of crimes which may be predicate acts for an action brought under the Racketeer Influenced Corrupt Organizations Act (RICO). The consequence of including these crimes as predicate acts is that it provides the government with additional criminal sanctions that may be imposed on organized distributors or producers of child pornography.

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(Footnote Continued)
disease has. Further, it is only the established 'stars' who can be choosy about their partners.").

Well-known performer, John Holmes, reportedly died of AIDS in April, 1988. According to the Adult Video News, Mr. Holmes stated that he "appeared in 2,274 films and loops and made love to 'a little over' 15,000 women." Adult Video News 50-53 (April 1988).

## LEGAL ANALYSIS--TITLE I

The provisions relating to amendments to existing federal law that prohibits the sexual exploitation of children are well within Congress' legislative authority. Each of these provisions is advanced based upon the ruling of the United States Supreme Court in New York v Ferber, 458 U.S. 747 (1982). In discussing the validity of a state regulation prohibiting the dissemination of child pornography, the Court made the following observations:

> For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.
>
> First. It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." * * *.
>
> The prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance. * * *.
>
> The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. * * *.
>
> Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. * * *.
>
> Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. * * *. We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against

> distribution: enforceable production laws would leave no child pornography to be marketed.
>
> Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. * * *.
>
> Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. * * *. Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, . . ., bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

458 U.S. at 756-64.

The proposed amendments are all well within the regulatory authority of Congress and its ability to protect children from the myriad of evils associated with the production and distribution of sexually explicit materials.

The provisions are designed to protect children from physical harm (e.g., Section 102, trading or selling children for the purpose of producing child pornography; Section 103, recordkeeping provision), emotional harm (e.g., Section 102), and the ability to attack each segment of the production and distribution process involved in the child pornography network (e.g., Section 101; Section 102; Section 103; and Section 104).

Specific legal concerns have been raised with respect to Section 103, the recordkeeping requirement. This section is based upon the requirements imposed by Congress in areas such as income tax reporting on proceeds gained through gambling and the transportation, storage, and disposal of hazardous material. [5] Regulations in each of these areas, just as the proposed amendment, have no substantive impact on the underlying activity. The individuals who engage in the activities must only maintain the proper records and so long as the records are properly maintained, the information contained therein cannot be used as the basis for a substantive criminal offense. Specifically if a producer accurately reports that an individual is seventeen years old, that information cannot be used as the basis for a criminal prosecution for a violation of 18 U.S.C. §2251.

The same regulatory scheme found in these other areas is being proposed in Section 103. The amendment merely requires producers and distributors of certain sexually explicit material to maintain minimal records on individuals whom they use in the material. As many spokespersons for the producers and distributors of this material have stated, they do not want to use underage performers in the material. [6]

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[5] *See*, 42 U.S.C. §§3002, 3003, and 3004.

[6] "My own personal view is that every magazine should be required to get consent forms of models who do participate in this kind of activity and I for one--here, I have to say that I have not spoken to my client [*Penthouse* magazine] on this and so I am speaking as an individual. I for one would be in favor of legislation that would require that if photographs are taken in the United States of America of American people, that consent forms should be required." Alan Dershowitz, Testimony before the Attorney General's Commission on Pornography 312 (New York, New York, January 22, 1986).

Section 201.

Section 201 creates a new section (18 U.S.C. §1466). Proposed section 1466 would prohibit the receipt or possession of obscene material that has been transported in interstate commerce with the intent to distribute such material. In addition, the penalties for such receipt or possession are enhanced if the individual is "engaged in the business" of selling or transferring obscene material.

Section 201 also includes a prohibition against the use of a "facility or means of commerce" for the interstate or foreign distribution of obscene material pursuant to §1465.[7]

Section 201 contains a rebuttable presumption that serves as proof of transportation in interstate or foreign commerce that is raised when the government provides evidence that the material originated in one state, and was located in another state or originated in a foreign country and was subsequently located in the United States. This presumption eliminates the need for the government to show the course of travel a particular item has taken to demonstrate transportation in interstate or foreign commerce.

Finally, section 201 amends 18 U.S.C. §1952 to include obscenity offenses in the list of crimes that constitute the use of interstate or foreign travel or transportation in aid of racketeering enterprises.

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[7] The prohibition against the use of a means or facility of commerce can also be found in 18 U.S.C. §1952A (use of interstate commerce facilities in the commission of murder-for-hire).

Section 201 is designed to streamline federal prosecutions of distributors of obscene material. The crux of this amendment is Congress' ability to regulate areas of interstate and foreign commerce. This amendment does not expand the scope of Congress' regulatory authority, nor does this amendment broaden the jurisdiction of federal prosecutors.

The new sections to Title 18 proposed in Section 201 relate to procedural and evidentiary matters that are well within the constitutional bounds of regulation. The presumptions contained in this section are directed toward the type of evidence that may be introduced rather than the level or sufficiency of proof needed for conviction.

Section 202.

Section 202 adds a new provision, 18 U.S.C. §1467, that would permit criminal forfeiture for obscenity violations. [8/] This provision permits the forfeiture, upon conviction, of the

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8/ This provision essentially mirrors the forfeiture provision available for violations involving the unlawful distribution or possession of controlled substances. See, 21 U.S.C. § 853. One notable difference is the omission of the rebuttable presumption found in 21 U.S.C. §853(d). This presumption states that property of a person is subject to forfeiture if the government establishes that the property was acquired during the period of the violation and that there was no likely source for the property other than the illegal acts.

offender's interest in the obscene material transported, any property traceable to the profits or proceeds from the offense and any property used to facilitate the crime.

Section 202 also contains a civil forfeiture provision 18 U.S.C. §1468. [9] Any obscene material transported in violation of Chapter 71, any property used to facilitate the commission of the violation, and all profits or proceeds derived from the violation are subject to civil forfeiture.

In light of the addition of comprehensive forfeiture provisions, section 202 also repeals the confiscation provision found in 18 U.S.C. §1465.

Section 202 amends the forfeiture provisions found in 18 U.S.C. §§2253 and 2254. Title 18 U.S.C. §2253, as amended, would provide for the forfeiture, upon conviction for a violation of §§2251, 2251A, or 2252, of any visual depictions involving minors produced or distributed in violation of Chapter 110, any profits or proceeds derived from such violation, and any property used to facilitate the commission of such a crime. Section 2254, as amended, would permit the civil forfeiture of any visual depiction produced or transported in violation of Chapter 110, any property used to facilitate the commission of an offense under 18 U.S.C. §§2251, 2251A, or 2252, and any profits or proceeds traceable to the commission of such offense. [10/]

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[9] This civil forfeiture provision in essentially the same as the civil forfeiture provision contained in 21 U.S.C. §881.

Section 202 contains one of the most effective means available to combat the obscenity "industry" and is therefore one of the most hotly debated provisions. The government is well within its authority under the United States Constitution to forfeit assets and proceeds derived from criminal activity. The only question which has been posed in the context of obscenity forfeitures is whether material that is presumptively protected by the First Amendment may be seized.

It is important to note at the outset that forfeiture is available under proposed Section 1467 only after a criminal conviction of obscenity is obtained. This insures that the defendant has received the greatest degree of due process available and that a prior judicial determination of obscenity has been made.

The forfeiture provisions mirror those found in the criminal drug laws. As in violations of drug laws, individuals amass great amounts of wealth and channel the proceeds from the criminal activity into legitimate businesses. These individuals also may use many of the customary business trappings, such as buildings, houses, cars, and equipment, to operate or facilitate the illegal activity. Through its use in or derivation from the

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[10/] These sections, as amended, would mirror 21 U.S.C. §§853 and 881, and the proposed amendments in 18 U.S.C. §§1467 and 1468.

criminal activity, the legitimate item has become a tool of the illegal business.

The principles of forfeiture law may be applied to any type of illegal activity. In the only federal case, to date, involving forfeiture issues in the context of an obscenity prosecution, the court in United States v Pryba, 674 F. Supp. 1504 (E.D. Va. 1987), made several significant observations. The court, in discussing the issue of prior restraint, noted first the differences between prior restraint and subsequent punishment and then stated:

> This is not to say the subsequent punishment schemes such as RICO's forfeiture scheme have no chilling effect whatever. Surely it has some; indeed, it is designed to accomplish just that end. But this "chilling" is a wholly legitimate consequence of the RICO forfeiture provisions or any other criminal penalty. Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally proscribed, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon. It is specially designed to chill or deter proscribed, unprotected speech; unconstitutional chilling occurs only if the definition of obscenity is excessively broad or vague so that some protected speech is unintentionally ensnared in the imprecise net that is cast.
>
> Nor is it significant that the forfeiture penalty may impact adversely on defendants' future speech. That fact alone does not mean that the First Amendment is implicated. The Constitution does not forbid punishment for a crime simply because that punishment might affect free expression.

674 F.Supp. at 1512-13.

On the subject of prior restraint, the court noted:

> The heart of this matter is that Congress has found that organized crime uses and exploits obscenity

> to further its pernicious aims and, therefore, that a pattern of racketeering activity observed deserves the forfeiture sanction. The fact that the racketeering activity involves expressive conduct is irrelevant. The First Amendment cannot be a shield for illegal activity. RICO's forfeiture provisions are not more of a restraint on free speech than is any felony conviction or prison sentence. Both of the latter are provisions that in some respect restrain speech but neither can be coherently termed a First Amendment violation. Logic dictates the same conclusion for RICO's forfeiture provision. The forfeiture remedy, properly construed and applied, does not impermissibly restrain further dissemination of speech, but rather simply requires those engaged in racketeering acts to disgorge their ill-gotten gains.

674 F.Supp. at 1516.

The court concluded:

> This Court concludes, at length, that Congress' decision to use RICO as a weapon against purveyors of obscenity does not offend the Constitution. This is so because the RICO criminal forfeiture provisions, as applied to obscenity, require that there be a nexus between the obscenity purveyor's ill-gotten racketeering gains and any protected material seized. Post conviction seizure of arguably protected materials and assets is constitutionally permissible where there is proper proof that they were acquired or maintained with the ill-gotten gains from racketeering activity, including dealing in obscenity. Therefore, RICO and its forfeiture provisions do not unconstitutionally chill protected speech or act as prior restraints.

674 F.Supp. at 1518.

Forfeiture provisions are often referred to as "Draconian", but enacting and implementing effective sanctions that are commensurate with the evils of the offense is not an unduly harsh or medieval practice. As with any illegal activity that is operated in a "businesslike" manner, innocent items may be subject to forfeiture as proceeds or instrumentalities of the crime. The shadow arguments that are shrouded in the First Amendment do not withstand close scrutiny and analysis.

Consequently, as the court in Pryba found, forfeiture is a constitutionally available remedy in an obscenity prosecution.

Section 203.

Section 203 contains an amendment to Title 18 (the addition of §1464A) that would prohibit the dissemination of obscene material on cable or subscription television. This section also specifically permits state or local governments to regulate obscene or indecent material on cable or subscription television.

Section 203 is a significant advancement in the area of cable and subscription television for two reasons. First, it specifically prohibits the dissemination of obscene material through such services and eliminates much confusion that has previously existed. Second, this provision allows local control over the content of subscription or cable television, thus allowing states to set standards on cable or subscription television that may already exist in other media.

Section 204.

Section 204 contains the "dial-a-porn" provision. In light of the enactment of the Helms-Bliley prohibition of dial-a-porn, this section should be disregarded.

## Section 205.

Section 205 contains an amendment (18 U.S.C. §1460) that would prohibit the sale or the possession with intent to sell any obscene material or material containing visual depictions of a minor engaging in sexually explicit conduct. In addition, section 205 would prohibit the knowing possession of a visual depiction of a minor engaged in sexually explicit conduct.

Section 205 has been touted by those who oppose obscenity laws as carte blanche for prosecutors to arrest every federal employee who buys an obscene video tape during the lunch hour and keeps it in his or her desk drawer with the intent to later distribute it to a neighbor. Aside from the improbability of this scenario, the analysis misses the objective of the amendment. This amendment is designed and will be implemented to force the federal government, in its buildings and on its lands, to "get its house in order." There are numerous circumstances in which obscene material is sold on federal land seemingly without recourse. This provision will allow the federal government to have available to it the same remedies as many states presently do.

## Section 206.

Section 206 adds obscenity violations to the list of crimes for which the Attorney General may authorize an application for an order approving the interception of wire or oral communications. This section is used to assist in the investigation of such crimes and will facilitate the gathering of evidence for the prosecution of such crime.

## III. Conclusion

The provisions of S. 2033, if enacted, will provide the necessary additional strength to permit law enforcement agents and prosecutors to efficiently enforce the existing laws. The interstate distribution of obscene material and child pornography requires the full force of legislative and prosecutive efforts. These provisions will fill the gaps that currently exist and will demonstrate the commitment of the federal government to eradicating the free flow of obscene material and child pornography.

While there are some who will diminish the need for such effective legislation, there has been a growing awareness of the insidious nature of obscene material and child pornography, particularly upon the young people in the nation. These provisions send a clear message to those who profit from the degradation and abuse of women and children. That message is that the federal government will take every step constitutionally possible to eliminate the trade in obscene material. These provisions are significant indications of such a commitment.

The American Family Association firmly believes that this legislation is important to the continued effort to combat the illegal flow of child pornography and obscene material. The passage of this legislation will send a clear message to the criminals who deal in this material that the cost of doing business has been raised. The American Family Association urges the Congress to act quickly and decisively in enacting this legislation.

# STATEMENT

# OF THE

# NATIONAL CABLE TELEVISION ASSOCIATION

# BEFORE THE

# SENATE COMMITTEE ON THE JUDICIARY

JUNE 8, 1988

The National Cable Television Association, Inc. ("NCTA") is pleased to submit this statement to the Senate Committee on the Judiciary. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of more than 2,700 cable television systems nationwide, and 56 cable television programming services engaged in creating and packaging a great diversity of cable programming. NCTA also represents equipment manufacturers, consultants, and other businesses and individuals interested in or affiliated with the cable television industry.

In recent years, the dissemination of pornography — hard-core, sexually-explicit material — has emerged as a growing and legitimate issue of public concern. No responsible communications industry can fail to acknowledge this fact. Moreover, as public awareness of the problem of pornography has grown, there has been increasing interest in the role of television as a distributor of adult/oriented programming. Our statement will discuss the unique role cable plays as both a distributor of programming and as an industry which has changed the American television customer's viewing expectations for all types of television programming.

Cable television is unique in that cable customers must actively choose to subscribe to cable services. After customers make the initial choice to take basic cable service, they then have the ability to choose additional pay services (such as Home Box Office or The Disney Channel). This ability to choose allows subscribers to create a total programming package which they design for their television viewing preferences and needs. Very importantly, the decision of whether or not to allow a particular type of programming into one's home is a matter of choice for each cable subscriber. For those who do wish to receive cable programming services which may carry R-rated movies, or even the few services that offer X-rated movies, the cable customer is offered several safeguards to help limit viewing availability. These safeguards include lockboxes, limited viewing hours, on-screen notices and scrambling.

This statement will also explain the cable industry's status with regard to the First Amendment and existing legislation. Our firm belief is that further regulation or legislation of any type of programming content is unnecessary. We believe the cable industry has reached a responsible balance between free speech and our public interest obligations where adult oriented programming is available.

Our statement is divided into three sections. The first section contains general background information about the cable television industry — what cable is and how it has developed. We also summarize briefly several technologies that frequently, and unfortunately, are confused with cable television. The second section reviews the specific topic of adult programming, focusing on the amount and nature of such programming available on cable and the special precautions taken by the cable industry to limit such programming to its intended audience. Finally, the third section reviews previous legislative efforts to regulate adult programming, with particular emphasis on how those efforts affect the First Amendment rights of cable operators, programmers, and subscribers. This discussion includes the provisions of the Cable Communications Policy Act of 1984 which deal with obscenity.

## I. CABLE TELEVISION: BACKGROUND

Although cable television service currently is being received in over 45 million homes, many people still have a limited understanding of what distinguishes cable from other video media. Therefore, it is useful at the outset to provide some basic background information about cable television -- how it has developed and grown, how it works, and what services it provides. It also is important, especially for those charged with responsibility for establishing public policy, to understand what cable television is not. Therefore, we also will describe briefly some of the technologies that often are confused with cable television.

### A. The Development of Cable Television

Cable television began in 1948 as a service to individuals in mountainous and geographically remote areas who could not receive over-the-air television signals. It served as a local or community antenna service to pick up broadcast signals and distribute them by coaxial cable to subscribers for a fee. The first cable television systems were small local ventures, and these small systems still represent a substantial percentage of the cable industry.

As cable developed in its early years, municipal involvement was generally limited to authorizing the use of local streets and rights-of-way and adopting regulations to protect the safety of life and property. These first cable television franchises or licenses were generally granted upon the application of a prospective operator. In 1952, cable systems were operating in 70 communities serving 14,000 subscribers. By 1955, community antenna television, as cable was then known, had 150,000 subscribers in 400 systems.

In order to expand into areas where over-the-air television signals could be received, however, cable operators had to provide potential subscribers with something more, something different than what the local broadcasters provided. As cable began to offer such programming alternatives, the line was crossed between cable service as a means to provide mere broadcast retransmission and as a means to provide alternatives to broadcast network programming.

The real catalysts in cable's conversion from an antenna service into a competitive source of programming were the development and availability of satellite technology and cable's entrepreneurial willingness to pioneer that technology as a means of national distribution for made-for-cable programming.

In 1975, Time, Inc. invested approximately $30 million and began satellite distribution of Home Box Office (HBO), which until then was primarily distributed over its Manhattan cable system. According to the prevailing wisdom of the "experts" at the time, the move was risky and would not return significant revenues. However, by 1978 HBO had over two million subscribers on over 700 cable systems, and the era of premium cable programming was born.

Similarly, in 1978, Viacom, another major cable operator, began satellite distribution of Showtime as a competitive alternative to HBO. They later acquired both MTV and Nickelodeon, cable networks devoted to music videos and children's programming, respectively. Both of these networks were in a rocky financial situation when they were acquired, but their formative concepts showed great promise for alternative programming, and Viacom was prepared to nurture its investment patiently.

Following the lead of Time, Viacom, and others — most notably, Turner Broadcasting — the cable industry has developed unique cable programming that offers the public quality alternatives to the network sitcoms and soap operas offered by cable's television competitors,the broadcasters. In effect, the risk Time, Inc. took paid off and changed the nature and mix of television programming.

Since 1975 the cable television industry has proven that television consumers will pay for distinctive, quality programming not offered by the broadcast networks and independent television stations. And in the process cable has created a new economic structure in the world of television. In creating this new structure, cable networks assumed financial risk when success was not assured. In fact, some programmers, such as CBS, tried to develop cable programs but failed. While others like ABC with ESPN, have successfully developed sought after cable programming.

Currently there also are 60 cable programming networks distributed nationally and 23 cable programming networks distributed regionally. Twelve more networks are in development and should be available to cable consumers in the not-too-distant future.

The American public has never before had access to such diversity of viewing choices. And television providers, cable and broadcasters, are in the midst of a vigorous competition for consumer attention. While broadcast networks still get over half of cable television viewers, fifteen years ago that number was over 98 percent. As cable invests in new, better and more diverse programming, we expect this trend to continue.

### B. What Cable Television Is

Under The Cable Act, a cable television system (or cable system) is defined as

> "... a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under

> common ownership, control, or management, unless such facility or facilities uses any public right-of-way ..." The Cable Communications Policy Act of 1984, P. L. 98-549, sec. 602 (6).

Restated in somewhat less technical terms, cable television can be described as a method of delivering video programming to subscribing customers by wire. Several features characterize the typical cable television system.

First, cable is a closed delivery technology. In other words, unlike traditional broadcast television, which transmits signals over-the-air to anyone within a stations's service area, the signals transmitted by a cable system travel through a closed wire and are available only to individuals who have chosen to have their television sets connected, via the wire, to the cable system.

Second, cable television is a subscription service. In order to receive cable programming, an individual must have the cable wire installed, typically for a fee, in his or her home. Once connected, a subscriber pays a monthly fee for a variety of services, which allows subscribers to choose from different packages of programs. The freedom to choose — to choose whether or not to subscribe and to choose what type of programming to receive — is a fundamental feature of cable television.

Third, cable systems use public rights-of-way to reach their subscribers. In most instances, the cable wire is strung along telephone or utility poles or is buried in an underground conduit. The cable comes into the home in much the same way as a telephone wire and is attached to the back of the customer's television set.

The use of public rights-of-way is related to a fourth characteristic of cable television, which is local franchising. The terms and conditions under which a cable system operator serves a particular geographic area typically are set forth in a contractual agreement, commonly know as a franchise, between the cable operator and the relevant state and/or local governmental body (such as a city). In the past, state and local officials frequently used their franchising power to impose all types of regulation on cable television systems. However, in adopting the Cable Communications Policy Act of 1984, Congress for the first time established a national policy which carefully carves out and limits the areas that are subject to regulation at the federal, state and local levels.

A fifth and final feature that characterizes cable television is the capability to provide subscribers with multiple channels of programming. More than 80 percent of all cable subscribers have over 30 channels of service available to them, while some modern, state-of-the-art systems have the capacity to deliver 100 or more channels. Utilizing this multiple channel capacity, most cable systems offer their subscribers a "basic" service package consisting of the local broadcast television stations and, in a number of cases, channels containing programming produced by the cable operator ("local origination") and/or programming produced by members of the community ("access"). In many instances, the basic package also includes nationally or regionally distributed distant broadcast television signals (such as Superstation WTBS) and satellite-delivered, nonbroadcast, largely advertiser-supported cable program networks (e.g., Cable News Network, CBN, ESPN). In other cases, groups of these distant signals and satellite networks are offered together in one or more separately-priced packages or "tiers." Finally, almost all cable systems offer at least one so-called pay or premium television service, such as HBO, Showtime, or The Disney Channel. These pay television services carry unedited, commercial-free movies and original programming specially produced for the cable audience and are sold to subscribers on a per-channel or per-program basis.

### C. What Cable Television Is Not

Having broadly described what cable television is and how it has developed, it is important to distinguish cable television from other nonbroadcast sources of video programming. Although cable television is far and away the most popular and best known alternative to traditional over-the-air broadcast television, the past few years have witnessed the introduction and growth of a variety or technologies capable of delivering video programming directly to the home. The products of this video revolution constitute a veritable alphabet soup of services: SMATV, MDS, MMDS, DBS, TVRO.

Distinguishing these services from cable television is not merely an academic exercise. For example, in April 1984, nationally syndicated columnist Jack Anderson wrote to members of Congress expressing his concern about "pornographic" cable television programming. Mr. Anderson recounted how he had observed hard core sexually explicit material on a television set in a Sacramento, California hotel room. Mr. Anderson described the source of this programming as "cable television." Yet, as it turned out, the material viewed by Mr. Anderson could not possibly have come from cable television since, at the time of the incident, construction had not even begun on a cable system in Sacramento.

Mr. Anderson's experience demonstrates how easy and dangerous it is to fall into the trap of lumping together under the label "cable television" any video programming that does not resemble traditional broadcast television. We believe it is essential that those charged with making public policy recognize and understand the engineering, programming, and legal distinctions between cable television and other alternative video technologies. A detailed discussion of these differences is beyond the scope of this statement. However, a brief description of the technologies most often mistaken for cable television is offered below.

(1) Master Antenna Television System (MATV) and Satellite Master Antenna Television System (SMATV) Many multiple-unit dwellings (such as apartment buildings, hotels, and motels) maintain an array of rooftop antennas to receive over-the-air broadcast signals. The signals are then delivered, usually without charge, to residents over a system of wires located within the building. Such a system is known as a Master Antenna Television System or MATV. In recent years, many buildings have added satellite receiving dishes to

their MATV systems, creating a Satellite Master Antenna Television (or SMATV) system. A SMATV offers residents one or more channels of nonbroadcast satellite programming in addition to the over-the-air broadcast television stations. In some instances, an additional charge is imposed on residents receiving the nonbroadcast programming. A key distinction between a SMATV and cable television is that a SMATV is located entirely on private property and does not cross public rights-of-way. The FCC has preempted most state and local regulation of SMATV operations.

(2) Multipoint Distribution Service (MDS) MDS is a private, nonbroadcast, over-the-air microwave service which provides one channel of programming to subscribers. Cable programming, such as HBO, is picked up by the MDS operator and transmitted via microwave to the MDS subscriber. Subscribers must have a special antenna to receive the signal and special equipment to convert the signal into a frequency compatible with a standard television set. MDS is used most commonly to serve multiple unit dwellings and, to a lesser extent, single family residences. The FCC also has authorized multiple channel MDS operations (MMDS) which are capable of providing up to eight channels of programming to subscribers. MDS and MMDS operations do not utilize public rights-of-way and most state and local regulation of these services has been preempted by the FCC.

(3) Direct Broadcast Satellite (DBS) DBS is a service which is designed to use high-powered satellites to deliver four or five channels of programming to small, rooftop receiving dishes. Authorized by the FCC as a means of providing satellite programming to rural areas too sparsely populated to warrant wire by a cable system, DBS is still in the developmental stage.

(4) Backyard Satellite Receiving Dishes (TVRO) Backyard dishes are receiving antennas used by individual homeowners to receive satellite-delivered programming. The dishes range from six to twelve feet in diameter, although smaller dishes are being developed. Most of the programming received by dish owners is primarily intended for other users—either cable systems or broadcast stations. However, some satellite services are targeted specifically at the home dish market. Some of the programming receivable by home dish users is being scrambled and is available to the dish owner through the payment of subscription fees.

## II. CABLE TELEVISION AND ADULT-ORIENTED PROGRAMMING

The carriage of adult programming by cable television systems remains a controversial, and not well understood topic. Yet, the amount and the nature of the adult-oriented material on cable television has been, and continues to be, grossly overstated. Moreover, most reports about the carriage of adult programming on cable television ignore cable's unique ability to restrict the availability of its services to the specific audiences for which they are intended. In the discussion that follows, we will seek to put to rest some of the misconceptions that have arisen about the nature of cable television programming and we will discuss the precautions which are taken when adult oriented programming is available.

### A. Cable Television Basic and Pay Services

As noted earlier, there currently are 60 different satellite-delivered, national cable programming services (or networks) in operation.[1] Twenty three other program networks operate on a regional basis. The overwhelming majority of these national and regional cable program networks are considered "basic" services — that is, they are marketed to customers in packages made up of multiple services. The rest of the program services are the premium television networks which are offered to subscribers on an individual channel basis (pay-per-channel) or a program-by-program basis (pay-per-view).

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[1] A list of the satellite-delivered cable networks is contained in NCTA's "National Cable Network Directory."

The largest of the basic cable services is ESPN (a subsidiary of CapCities/ABC Inc.). ESPN is a sports-oriented channel which, as of March 1988, reached over 46 million subscribers (including some SMATV subscribers). Other popular basic networks include Cable News Network (CNN), a 24-hour news channel, which has over 44 million subscribers, and Nickelodeon, a children's network, which has approximately 38 million subscribers. There are other basic networks devoted to Spanish-language programming, health and educational programming, religious programming, music videos, and general entertainment programming. There is a 24-hour weather channel. The important fact about these widely-carried basic cable networks is that not a single one features sexually-explicit programming.

## B. Cable Customers' Freedom of Choice

The very limited amount of "adult" programming that does appear on cable television is confined largely to pay-per-channel and pay-per-view services. A fundamental feature of these services (and of cable television in general) is that they are available only to those persons who affirmatively choose to subscribe. A subscriber who is dissatisfied with a service may cancel at any time or not take the service to begin with. Thus, and very importantly, the decision of whether or not to allow a particular type of cable programming into one's home is a matter of private, individual choice.

No doubt reflecting the freedom of choice offered by cable television, a variety of pay-per-channel and pay-per-view services have developed. Some, such as The Disney Channel and Festival, feature only family entertainment. Other pay networks offer a mixture of programming that ranges from children's shows to movies and specials intended for adult audiences. And, there are four part time services devoted exclusively to adult-oriented material.

The best known and most popular of the pay television networks (pay-per-channel) are Home Box Office (HBO) and Showtime. HBO is a 24-hour, commercial-free network that features a wide variety of movies, sports, and original entertainment programming. As of March 1988, HBO was carried by some 7,000 cable systems and SMATV operations and had 15.9 million subscribers. Showtime, with 5.9 million subscribers, also offers a variety of movies and original entertainment specials. A number of other networks offer similar types of programming. These services include Cinemax (5.1 million subscribers) and The Movie Channel (2.5 million subscribers).

All of the above mentioned pay cable services have adopted policies against the exhibition of X-rated movies. And, although some pay cable services present R-rated movies and other programs with a stronger adult content than is typically found on broadcast television, by no stretch of the imagination can the material carried on these services be characterized as "pornographic." Indeed, the Final Report of the Attorney General's Commission on Pornography (published in July 1986), expressly concluded that "by and large the the sexually explicit material available on cable would not be of the type likely to be determined to be legally obscene." Rather, the Commission found the content of pay cable services is "somewhat closer to what is available in a mainstream motion picture theater."

Out of the more than 80 nationally and regionally satellite-delivered programming service, our research has identified only four part-time networks that currently are intended exclusively for adult audiences. And only one of these services is specifically designed for cable, while the others serve primarily the MMDS and the home dish markets. Despite some generalized complaints about these part-time services, newspaper reports suggest that the most common complaint heard by adult-oriented cable programmers is not that the programs are too explicit, but that they are not explicit enough.

The largest of the services devoted exclusively to adult programming is The Playboy Channel. A video-counterpart to the popular men's magazine, The Playboy Channel operates between 8 p.m. and 6 a.m. and carries R-rated and unrated movies and original, adult-oriented programming. The service began operations in November 1982 and currently is distributed to around 520,000 subscribers in 600 cable systems. (By way of comparison, The Disney Channel, a family-oriented pay channel, was introduced in April 1983 and now has over 3.8 million subscribers in approximately 5,000 cable systems). Playboy also operates Playboy on Demand, a pay-per-view service which currently is carried by some cable systems.

In addition to The Playboy Channel, two smaller satellite-delivered networks distribute sexually oriented programs to various distribution sources, including some cable systems. American Exxxtasy began operations in January 1985 and offers sexually oriented movies (albeit "softer" edited versions than those available in movie theaters and on video cassettes) between 7 p.m. and 6 a.m. This network, which primarily services home dish owners, SMATV and MDS operations, currently claims fewer than 20 cable system affiliates. The Tuxxedo Network (co-owned with American Exxxtasy) is a newer service offering adult entertainment to cable, home dish owners and other video distribution services. The Tuxxedo Network operates seven days a week from 7 p.m. to 6 a.m. and reports having approximately 20 cable system affiliates.

### C. Local Origination and Access Channels

Two other potential sources of adult programming on cable television deserve brief mention: local origination and access channels. Newspaper and magazine articles about adult programming on cable occasionally describe the carriage of sexually explicit movies on locally originated channels. We are aware of only one system that offers locally originated X-rated movies. The system offers this service only on a pay-per-view basis and has several built in safeguards to ensure that only authorized adult customers receive the programming. While there may be other systems that locally originate sexually oriented material on a per-channel or per-program basis, it seems apparent that the practice is the exception not the rule.

Similarly, press reports also refer to New York City's leased access channel, which carries late night, sexually oriented programs and is available to all subscribers. This situation is made possible by provisions of the New York City cable franchise, which require, as a condition of operating a cable system, that the cable company offer "access" channels to all parties on a non-discriminatory basis, without any regard to the content of the programming presented. The special problems presented by access programming, over which cable operators have no editorial control, will be touched on in the discussion below concerning legal efforts to regulate cable program content. Suffice it to say that the New York experience does not appear to have been replicated anywhere else.

### D. Precautions taken by the Cable Industry

The above discussion hopefully has made clear that adult programming represents only a miniscule portion of the overall programming available on cable television. Moreover as noted, the sexually oriented programming that is carried on cable television typically is far milder in content than the material available from other sources, such as home video cassettes. Most importantly, the freedom of choice inherent in cable television allows individuals to choose whether or not to subscribe to particular types of programming. This unique characteristic is supplemented by several other steps taken by the cable industry to ensure that adult programming is not forced upon either those who do not wish to receive it or those for whom such programming would not be appropriate. These steps include the following:

(1) Limited Viewing Hours Most of the services that offer programming intended for adult audiences limit such programming to evening or late-night hours. For example, HBO does not show any R-rated movies before 8 p.m. Some other services restrict their adult programming to even later hours.

(2) Program Guides and On-Screen Notices Many cable systems and programmers publish detailed program guides. These guides provide specific information about the content of particular programs, identifying whether a program features nudity, sexual themes, violence, profanity, or other material that might be deemed offensive by some people. In addition, before an R-rated film is shown, many programmers run an on-screen notice advising parents of the nature of the programming about to be presented.

(3) Lockboxes The Cable Communications Policy Act requires all cable television system to provide, by sale or lease, a device, known as a "lockbox" or "parental key." With the lockbox a cable customer can prohibit the viewing of particular cable channels to which the customer subscribes during periods controlled entirely by the customer. (The Cable Act, Sec. 624 (d) (2) (A)). The cable industry willingly agreed to this provision of the Cable Act, and even prior to the passage of the Cable Act, many systems voluntarily offered their customers the opportunity to obtain such devices.

(4) Scrambling. In many cases, pay television services are scrambled (either by the programmer or by the cable system operator) to prevent unauthorized reception. Scrambling serves as a further precaution against the inadvertent reception of adult programming by subscribers who do not wish to have such material come into their homes. There is

legislation pending in both the House (H.R. 1885) and the Senate (S. 889) which could have the effect of causing cable programmers to lose control of the way that programming, including both adult and children's programming is distributed, packaged and made available to the backyard dish owner. This "scrambling" legislation--the Gore Bill, S. 889, and the Tauzin Bill, H. R. 1885,--would, among other things, require that:

> (i) all scrambled cable programming must be made available to home dish owners and,
>
> (ii) require that if a cable programmer distributes its programming through any third-party then every and any "reasonable" third-party distributor would be given a federally mandated right to take that programming (adult-oriented programming included) and package and distribute it without restriction by the cable programmer to home dish owners.

The impact of this as it pertains to adult cable programming is far reaching. Legally, if this legislation were to pass, a third-party distributor could take the Christian Broadcasting Network (CBN), which now carefully polices how its family-oriented programming is packaged and distributed, and package it with the Playboy Channel. CBN, under the Gore/Tauzin legislation would have no control over such practices.

Needless to say, for this and for may other reasons, the cable industry opposes any "scrambling" legislation. We believe the cable industry should have the right to control the access, distribution and packaging of its programming products.

## III. CONTENT REGULATION AND CABLE TELEVISION

As the preceding discussion has demonstrated, the cable television industry exercises considerable restraint and responsibility with respect to adult oriented programming. At least in part, the misimpression that some people have about the availability of adult programming on cable television is the result of confusion between cable and the various other technologies that deliver video programming directly to one's home or to hotels and motels.

However, the tendency of some people to attribute any non-broadcast video service to cable television represents only part of the reason that the public has an erroneous conception of the type of programming carried by cable. Undoubtedly, the public's misconceptions about cable programming also stem in part from the efforts of a small, but vocal minority that finds offensive the carriage of any adult programming by cable, no matter how tame or what protections are offered to restrict reception to an appropriate audience. According to these groups, the occasional nudity and use of profanity found in R and even some PG movies (including such Academy Award winning films as Kramer vs. Kramer and Ordinary People) are "pornographic." For example, in an article in Cablevision magazine, Rev. Morton Hill, the founder of Morality in Media, a leading "anti-cableporn" organization, cited the movie All The President's Men (rated PG) as an example of an "offensive" movie. While we do not question the sincerity or motives of these groups, we do not believe most people share their views as to what constitutes programming so objectionable that government intervention is needed to restrict cable subscribers' freedom of choice.

Over the past few years, groups such as Morality in Media have mounted efforts to have so-called "cable decency" laws enacted at the federal, state, and local level. These laws seek to proscribe the transmission by cable television of programming that, while not legally obscene, are characterized as "indecent" or "patently offensive." In this section, we explore the constitutional questions raised by the passage of such laws. We also review the current status of laws regulating obscenity on cable television.

## A. Cable Decency Laws and the First Amendment

The language of the First Amendment is simple, direct, and seemingly unqualified: government "shall make no law abridging the freedom of speech, or of the press." Nevertheless, the Supreme Court has long recognized that certain categories of speech are subject to regulation by the government. The best known, and most difficult to define, of these categories of "unprotected" speech is "obscenity."

The Supreme Court's struggle with the problem of articulating a workable definition of "obscenity" is well known. The current definition was settled upon in 1973. Commonly referred to as the Miller standard, thi three-part test defines material as obscene if:

(1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[2]

Based on existing judicial precedent, it seems likely that federal, state, and local laws directed at sexually explicit programming are constitutional so long as they confine themselves to material that is "obscene" under the Miller test. However, much more difficult questions are raised by so called "cable indecency laws," which seek to regulate programming that does not satisfy all three prongs of the Miller standard. To support their efforts at regulating non-obscene speech, proponents of "cable indecency" laws point to the Supreme Court's 1978 opinion in FCC vs. Pacifica Foundation, 438 U.S. 726 (1978), which held that in certain circumstances, indecent, but not obscene, speech on broadcast radio could be regulated.

Pacifica arose out of a complaint filed with the FCC concerning a radio station's broadcast of a monologue by comedian George Carlin, entitled "Filthy Words." The complaining party was a man who heard the broadcast in the middle of the afternoon on his car radio while driving with his young son. Characterizing the monologue as "patently offensive," though not obscene under the Miller test, the FCC issued a declaratory order holding that it had authority to impose administrative sanctions on the station for broadcasting "indecent" material.

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[2] Miller v. California, 413 U.S. 15,24 (1973).

On appeal, the Supreme Court affirmed the FCC's action. Noting that the FCC's decision was based, in essence, on a "nuisance" rationale, the Court pointed to two factors that supported regulation of indecent, but not obscene radio broadcasts: (1) the pervasive intrusiveness of the broadcast media (and the consequent impact of broadcast matter on a person's privacy rights) and (2) the "unique" accessibility of broadcasting to children.

Although defenders of "cable indecency" legislation frequently cite Pacifica as providing the constitutional basis for regulation of non-obscene cable programming, the Supreme Court apparently disagrees. In Jones v. Wilkinson, the high court affirmed without opinion a lower court ruling which found that Pacifica is not applicable to cable television.[3] Several other lower court decisions have reached the same conclusion.[4]

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[3] Community Television of Utah v. Wilkinson, 611 F. Supp. 1059 (Utah 1985), aff'd sub nom. Jones v. Wilkinson, 800 F.2d 1099 (10th Cir. 1986), aff'd., 107 S.Ct. 1559 (1987).

[4] See Community Television of Utah v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1984), aff'd, 755 F. 2d 1415 (11th Cir. 1985) In HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982), the court struck down a state law proscribing "indecent" cable programming without expressly reaching the question of Pacifica's applicability.

In considering the constitutionality of laws regulating "indecent" cable programming, the courts have stressed the differences between cable television and broadcasting, particularly the freedom of choice inherent in cable television. As the Supreme Court has recognized, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). In Pacifica the Court noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. In contrast, there is a growing body of law establishing that cable operators exercise a significant amount of editorial discretion regarding what their programming will include and thus are entitled to a broad measure of First Amendment rights. These rights, it should be noted, extend not only to cable operators, but to cable programmers and to the interests of subscribers, as well.[5]

Because cable television is entitled to broad First Amendment protection, laws regulating non-obscene cable programming are subject to an exacting measure of scrutiny by the courts. As noted, this scrutiny uniformly has resulted in the conclusion that the twin rationales of Pacifica do not warrant regulation of cable television. To begin, unlike broadcasting, cable is not a pervasive presence that intrudes upon an individual's privacy rights. Rather, like newspapers and magazines, cable is a subscription service, received only by those persons who specifically order it and are willing to pay for it. Second, the ability of parents to control the availability of cable programming to their children stands in stark contrast to the "unique" accessibility of the broadcast medium. Parents who do not wish their children to be exposed to certain types of cable programming may choose not to subscribe to those services, or indeed, they may choose to forego cable service entirely. Where cable services containing adult programming (or any other material that particular parents might find inappropriate for their children) are selected, parents have the option of obtaining a lockbox-type device to restrict viewing. Limitations on the times during which adult programming is shown and the availability of program guides further serve to distinguish the enhanced parental control afforded by cable television from the uncontrolled accessibility inherent to radio broadcasting that was determinative in the Pacifica decision.

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[5] See, e.g., City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986); Century Communications Corp. v. FCC, F.2d (D.C. Cir. 1987), cert. denied, Quincy Cable TV, Inc. v. FCC, 768 F. 2d 1434 (D.C. Cir., 1985), cert. denied, 106 S.Ct. 2889 (1986).

The conclusion that Pacifica does not apply to cable television is bolstered by the Supreme Court's own emphasis on the narrowness of its decision in that case. 438 U.S. at 750. Moreover, in a subsequent decision, Bolger v. Youngs Drug Product, 103 S. Ct. 2875 (1983), the Court essentially limited Pacifica to its particular facts. In Bolger, the Court struck down a federal statute prohibiting the unsolicited mailing of contraceptive advertisements. Justice Marshall, writing for the Court, distinguished Pacifica, stating that "our decisions have recognized that the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." 103 S. Ct. at 2884. In Bolger, neither the privacy interest of individuals who did not want to receive advertisements for contraceptives, nor the interest of parents in controlling their children's access to information about sexual matters, justified the regulation at issue. As the Court pointed out, the government's interest in the privacy rights of its citizens does not warrant restrictions on speech where the recipients of objectionable mailings can easily avoid the material. Similarly, the interest in protecting children, while substantial, does not justify regulation which has the effect of "reducing the adult population...to reading only what is fit for children." (Id. quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

## B. Obscenity Laws and Cable Television

While the First Amendment places clear limits on the ability of government to regulate the content of cable programming, laws prohibiting the carriage by cable of "obscene" programming, as defined by the Miller test, are fairly common at the state and municipal level. Moreover, with the passage of the Cable Act, federal law now expressly prohibits cable systems from transmitting "any matter which is obscene or otherwise unprotected" by the Constitution. Violators of this provision are subject to a fine of up to $10,000 and up to two years in jail, or both.[6]

In addition to this provision, several other sections of the Cable Act regulate certain cable programming. As noted earlier, Section 624(d)(2)(A) requires that cable operators make available to subscribers lockbox devices. More generally, Section 624(d)(1) states that cable operators and franchising authorities may specify, in a franchise, "that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or otherwise unprotected by the Constitution." Section 638 makes clear that nothing in the Cable Act is intended to preempt state and local laws imposing civil or criminal liability on cable operators and programmers for the transmission of unprotected speech, including obscenity. This section contains a proviso, however, creating an exception under which no liability may be imposed on cable operators with respect to programming carried on PEG (public, educational, and governmental) and leased access channels.

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[6] The Cable Communications Policy Act, P.L. 98-549, Sec.639.

### C. PEG and Leased Access Channels

The special situation presented by PEG and leased access channels merits particular mention. Under Sections 611 and 612 of the Cable Act, cable operators may be required to set aside certain channels for use by third parties, either without charge or pursuant to a lease agreement. The stated purpose of the Cable Acts' PEG and leased access provisions is to increase the diversity of cable programming. To further this goal, Sections 611(e) and 612(c)(2) of the Act expressly prohibit cable operators from exercising any editorial control over the content of programming carried on PEG or leased access channels. Having stripped cable operators of editorial control of PEG and leased access channels, Congress recognized that it would be inappropriate to subject operators to any liability for material carried on those channels. Thus, in the case of PEG channels, Section 611(e) provides only that cable operators and franchising authorities may agree to franchise terms that prohibit or condition the use of such channels for "obscene" programming. With respect to leased access channels, Section 612(h) reaches a similar result, stating that such channels are not to be used, or are to be used subject to conditions "if such cable service in the judgement of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected" by the Constitution.

## CONCLUSION

Cable television is uniquely suited to the presentation of a wide diversity of information and entertainment services designed for particular audiences. As managers of a significant communications medium, cable operators have substantial constitutional protections under the First Amendment. These protections include the freedom to present non-obscene adult programming material that some persons may find offensive or otherwis objectionable. The cable industry accepts and understands that concomitant with such freedom is a public interest obligation to help ensure that children and unwilling adult viewers are not exposed to adult programming.

The existing statutory provisions, described above, reflect a carefully drawn balance between the First Amendment rights of cable operators, programmers, and subscribers on the one hand, and the public's legitimate concern regarding the distribution of sexually explicit matter c the other. Moreover, in the view of at least some of the members of the Attorney General's Commission on Pornography, the existing law is sufficie to protect the public and no changes in that law are necessary. As the Commission's Final Report stated, "some of us believe that enforcement of obscenity laws with respect to {cable programming}, when combined with vigorous enforcement of the "lockbox" requirements so that children may be prevented by their parents from seeing such material, are all that is appropriate at this time." NCTA endorses this conclusion and urges the Committee not to amend or otherwise modify the present law with respect to cable television.[7]

NCTA believes that the cable industry is fulfilling its duty to conduct itself in a responsible fashion. While we share the public's concern about the manner in which adult material is presented on cable television, it is our view that further government intervention, either by regulation or legislation, is neither an appropriate nor a necessary means of dealing with this concern. As the courts have recognized, attempts to regulate cable programming through government action invariably sweep too broadly, chilling the legitimate exchange of information and expression of ideas. Instead, we believe the balance between free speech and the public's legitimate concerns about the availability of adult programming to those for whom such material is not appropriate can best be served by reliance on the freedom of choice inherent in cable television, the cable industry's continued responsible self-regulation, and existing provisions of law.

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[7] The Attorney General's Commission evinced some concern that the Cable Act provisions dealing with obscene cable programming were internally contradictory or inconsistent. In particular, the Commission's report suggests that the prohibition on the transmission of obscene cable programming in Section 639 may conflict with Sections 611(e) and 544(d). As noted above, Section 611(e) ensures that cable operators will not be held liable for the content of programming over which, as a matter of statutory fiat, they have no editorial control while Section 544(d) merely establishes the power of state and local officials to prohibit or condition the carriage of unprotected speech. These provisions are not in conflict with or inconsistent with any other portion of the Act.

# CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1988--S. 2033

## STATEMENT TO THE SENATE JUDICIARY COMMITTEE

ELDER JOHN K. CARMACK

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

8 JUNE 1988

I APPRECIATE THIS OPPORTUNITY TO SUBMIT THIS TESTIMONY ON BEHALF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS. I ALSO REPRESENT THE CHURCH ON THE STEERING COMMITTEE OF THE RELIGIOUS ALLIANCE AGAINST PORNOGRAPHY, AN ORGANIZATION WHOSE AFFILIATE CHURCHES ARE ALARMED BY THE SPREAD OF CHILD PORNOGRAPHY AND HARD-CORE OBSCENITY IN THIS COUNTRY. OUR COMMITMENT IS TO WAGE WAR AGAINST PORNOGRAPHY IN PARTNERSHIP WITH LOCAL, STATE, AND FEDERAL GOVERNMENTS. FEDERAL LAWS AND ENFORCEMENT ARE PARTICULARLY IMPORTANT IN VIEW OF THE DOMINATION OF THIS DARK BUSINESS BY NATION-WIDE ORGANIZED CRIME.

AT THE OUTSET LET ME MAKE IT CLEAR THAT WE WHOLE-HEARTEDLY SUPPORT THE FIRST AMENDMENT. THE UNITED STATES SUPREME COURT HAS CLEARLY HELD THAT THE FIRST AMENDMENT DOES NOT PROTECT OBSCENITY. THIS MAKES IT POSSIBLE TO REGULATE IT BY LAW AND PROSECUTE CRIMINALS WHO VIOLATE THE LAW.

MANY OF OUR VALID AND WISE CONSTITUTIONAL AND LEGAL PRINCIPLES AND REGULATIONS ARE SUPPORTED BY PUBLIC ACCEPTANCE OF MORAL PRINCIPLES RATHER THAN SCIENTIFIC RESEARCH WHICH TIES DOWN AND CONNECTS EACH AND EVERY POINT. IF THERE HAD BEEN AN INSISTENCE ON VALIDATION OF EVERY POINT OF THE UNITED STATES CONSTITUTION BY THE CONVENTION IN PHILADELPHIA, THE COLLECTIVE AND REPRESENTATIVE WISDOM OF THOSE MEN WOULD NEVER HAVE JELLED INTO THE DOCUMENT WHICH HAS

SERVED US SO WELL FOR THESE TWO HUNDRED YEARS.

WE BELIEVE IT IS SELF-EVIDENT THAT THE USE OF CHILDREN IN CREATING AND DISTRIBUTING PORNOGRAPHY TO CHILDREN AND ADULTS IS MORALLY WRONG--MALUM PER SE. WE BELIEVE ALL PORNOGRAPHY IS MORALLY WRONG, BUT ESPECIALLY SO-CALLED HARD-CORE PORNOGRAPHY. HARD-CORE PORNOGRAPHY IS SO WRONG THAT ANYONE WHO CAN STOMACH A LOOK AT IT, OR WHO WALKS DOWN A LOS ANGELES OR NEW YORK STREET WHERE IT IS READILY SEEN ON A MARQUEE OR DISPLAYED FOR SALE CAN FEEL A SENSE OF OUTRAGE AND REVULSION. WE DO NOT BELIEVE IT IS ESSENTIAL TO PROVE A CAUSAL RELATIONSHIP BETWEEN THE PRODUCTION, DISTRIBUTION, AND USE OF THIS MATERIAL AND HARM TO CHILDREN, WOMEN, AND MEN. ONE JUST KNOWS THAT GARBAGE AND SEWAGE ON THE STREETS WHERE IT IS IN CONTACT WITH HUMANS IS DESTRUCTIVE OF GOOD PHYSICAL HEALTH AND THAT MORAL GARBAGE CREATED, DISTRIBUTED AND USED BY HUMANS IS DESTRUCTIVE OF THE MORALITY OF THE COMMUNITY.

NEVERTHELESS, IT IS HELPFUL TO KNOW THAT BETWEEN THE 1970 PRESIDENTIAL COMMISSION ON OBSCENITY AND PORNOGRAPHY AND THE 1986 REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, VALID RESEARCH HAS MADE THE CONNECTION BETWEEN OBSCENITY AND HARM FLOWING FROM IT. WHAT WE KNEW IN OUR HEARTS HAS NOW BEEN AMPLY DEMONSTRATED BY RESEARCH, ADMITTEDLY NOT YET TO EVERYONE'S COMPLETE SATISFACTION. THE RESEARCH SHOULD CONTINUE. BUT WE NOW KNOW SCIENTIFICALLY THAT THE USE OF OBSCENITY CLEARLY DESENSITIZES ITS USERS AND INCREASES THE LIKELIHOOD OF MALE AGGRESSIVENESS AGAINST WOMEN AND CHILDREN. IT ALSO DECREASES BOTH MALE AND FEMALE SENSITIVITY TO RAPE AND THE PLIGHT OF THE RAPE VICTIM.

THOSE OF US WHO HAVE BEEN CALLED UPON TO DEAL WITH ABUSED AND BLIGHTED LIVES KNOW THAT ALMOST WITHOUT EXCEPTION THESE ABUSED GIRLS, WOMEN, BOYS, AND EVEN MEN ARE THE VICTIMS OF THOSE AROUSED TO AGGRESSION AND ABUSE, AT LEAST IN PART, BY PORNOGRAPHY.

WE CAN ASSERT WITHOUT SERIOUS DOUBT TODAY WHAT WE HAVE ALWAYS SENSED--THIS ISSUE IS A PUBLIC SAFETY ISSUE DEMANDING ACTION TO PROTECT THE INNOCENT FROM EXPLOITATION AND SERIOUS HARM. THERE SEEMS NO GOOD AND VALID REASON WHY CONGRESS SHOULD NOT ACT ON THESE BILLS GROWING OUT OF THE 1986 REPORT AND RECOMMENDATIONS.

THE LOS ANGELES COUNTY BOARD OF SUPERVISORS RECENTLY PASSED A RESOLUTION ASKING THE UNITED STATES ATTORNEY GENERAL FOR SOUTHERN CALIFORNIA TO SET UP A SPECIAL TASK FORCE TO PROSECUTE DISTRIBUTORS OF PORNOGRAPHIC MATERIALS, AND PLANS TO DO SO HAVE BEEN ANNOUNCED. I MENTION LOS ANGELES BECAUSE THAT IS THE SITE FOR THE PRODUCTION OF 80% OF THIS MATERIAL. SINCE A NATION-WIDE BUSINESS HAS GROWN UP, HOWEVER, WE NEED YOUR HELP ON THE NATIONAL LEVEL TO SHARPEN THE TOOLS FOR THE BATTLE. WITHOUT GETTING INTO THE TECHNICALITIES OF THE LEGISLATION BEFORE THE CONGRESS, LET US IN SUMMARY SAY THAT WE SUPPORT THIS LEGISLATION WHICH IS DESIGNED TO ADD WEAPONS FOR USE BY THOSE IN THE FIGHT TO PROTECT CHILDREN FROM EXPLOITATION BY (1) REQUIRING RECORD-KEEPING WHICH WOULD MAKE PROSECUTION EASIER AGAINST PRODUCERS, DISTRIBUTORS, AND RETAILERS THUS INHIBITING SUCH CLEAR CHILD ABUSE; (2) MAKING IT CLEAR THAT IT IS AGAINST FEDERAL LAW FOR

EVEN A PARENT TO USE A CHILD IN PRODUCING PORNOGRAPHY; (3) PROHIBITING EXCHANGE OF INFORMATION CONCERNING CHILD PORNOGRAPHY THROUGH COMPUTER NETWORKS; (4) ALLOWING FORFEITURE OF PROPERTY BY THOSE PRODUCING DISTRIBUTING AND RETAILING SUCH MATERIAL; (5) AND ADDRESSING OTHER DEFICIENCIES IN OUR CURRENT ARSENAL OF PROSECUTIONAL TOOLS.

WE FEEL A STRONGER FEDERAL ROLE IN COMBATING OBSCENITY IS WARRANTED BECAUSE OF THE GROWING PRESENCE OF ORGANIZED CRIME IN THE MULTI-BILLION DOLLAR OBSCENITY INDUSTRY AND BECAUSE OF THE INTERSTATE AND INTERNATIONAL SCOPE OF THE PROBLEM. THE FULL STRENGTH OF A NATIONAL LAW ENFORCEMENT EFFORT WILL BE REQUIRED TO EFFECTIVELY ADDRESS IT. UNDER THIS ACT INTERSTATE TRAFFICKING IN OBSCENE MATERIALS WILL BE EASIER TO PROVE AND WE PARTICULARLY LIKE THE PROVISION ALLOWING FORFEITURE OF PROPERTY ATTRIBUTABLE TO PROFITS MADE BY VIOLATION OF OBSCENITY LAWS.

WE SALUTE RECENT INITIATIVES BY THE CONGRESS AND THE FCC TO ELIMINATE DIAL-A-PORN. THOSE PROVISIONS OF THE ACT BEEFING UP REGULATION OF OBSCENITY TRANSMITTED OVER CABLE OR SUBSCRIPTION TELEVISION ARE EXCELLENT.

LET ME READ A STATEMENT FROM A CONDEMNED CHILD MURDERER WHO TERRORIZED OUR COMMUNITY SEVERAL YEARS AGO WITH A STRING OF SEX-RELATED MURDERS OF YOUNG BOYS. HE HAS CONFESSED:

> "PORNOGRAPHY WASN'T THE ONLY NEGATIVE INFLUENCE IN MY LIFE, BUT ITS EFFECT ON ME WAS DEVASTATING. I LOST ALL SENSE OF DECENCY AND RESPECT FOR HUMANITY AND LIFE, AND I WOULD DO ANYTHING OR TAKE ANY RISK TO FULFILL MY DEVIANT DESIRES. IF PORNOGRAPHIC

MATERIAL WOULD HAVE BEEN UNAVAILABLE TO ME IN MY EARLY STAGES, IT IS MOST PROBABLY THAT MY SEXUAL ACTIVITIES WOULD NOT HAVE ESCALATED TO THE DEGREE THEY DID."

EVIDENCE CONTINUES TO MOUNT ON THE ROLE OF PORNOGRAPHY IN HELPING CREATE THIS DANGEROUS CRIMINAL WORLD.

LETS PROTECT THE VICTIMS RATHER THAN THE VICTIMIZERS AND PROFITEERS! THE PROFITS OF ORGANIZED CRIME ARE TREMENDOUS IN PORNOGRAPHY. LETS GO AFTER THEM.

IN CLOSING LET ME AGAIN STATE, THE ISSUE IS NOT A FREE SPEECH ISSUE BECAUSE THE UNITED STATES SUPREME COURT HAS MADE CLEAR OVER AND OVER THAT OBSCENITY IS NOT PROTECTED FREE SPEECH UNDER THE FIRST AMENDMENT. THE ISSUE IS, DO WE HAVE THE WILL TO SAFE-GUARD WOMEN AND CHILDREN, AGAINST INCREASINGLY SICK, FORCEFUL, AND VIOLENT CRIMES. THE PASSAGE OF THE "CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1987" WILL PROVIDE ADDITIONAL USEFUL TOOLS TO CURB THE FLOOD TIDE OF ILLEGAL OBSCENITY IN THIS COUNTRY.

NATIONAL
CENTER FOR
MISSING
& EXPLOITED
CHILDREN
TM

1835 K Street, N.W. • Suite 700 • Washington, D.C. 20006
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TESTIMONY OF

David W. Lloyd
General Counsel
NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

on

S.2033
CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1988

and

S.703
PORNOGRAPHY VICTIMS PROTECTION ACT OF 1987

for the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 13, 1988

The National Center for Missing and Exploited Children appreciates the opportunity to present our technical analysis of S.2033, the Child Protection and Obscenity Enforcement Act of 1988, and S.703, the Pornography Victims Protection Act of 1987.

The Center is a private, nonprofit corporation whose mission is to decrease the incidence of crimes against children, effect positive changes in public law and policy and to encourage an awareness of the significance of all crimes against children, and to assist families and those who seek to protect children. The Center is supported by a public sector-private sector partnership. It is funded in the public sector by the Office of Juvenile Justice and Delinquency Prevention to operate a national toll-free telephone line to receive reports of the location of a missing child as defined by the Missing Children's Assistance Act[1] and to provide information on how to reunite the child with his/her legal custodian, and also to establish and operate a national resource center and clearinghouse to provide technical assistance to local and state governments, public and private nonprofit agencies, and individuals in locating and recovering missing children; to coordinate such public and private programs; to disseminate information about innovative and model programs, services, and legislation; and to provide technical assistance "in the prevention, investigation, prosecution, and treatment of the missing and exploited child case." (emphasis added).

The Center is interested in S.2033 because the Missing Children's Assistance Act recognizes the documented link between missing children and child sexual exploitation. Research conducted by the Jefferson County, Kentucky Exploited and Missing Child Unit during 1984 revealed that approximately 10% of the missing children it recovered had been sexually exploited while missing, and 85% of the sexually exploited children were missing at the time.[2] The Center's own experience with the hotline indicates that approximately 25% of more than 18,000 reports of missing children have involved allegations that the child was also being sexually exploited. Research indicates that those who molest children frequently have an interest in child pornography and erotica.[3]

The Center's activities on behalf of sexually exploited children have been based on three approaches: direct technical assistance from one of our technical advisors--all of whom have prior experience in law enforcement or juvenile justice, the development of publications, and the provision of training. Direct technical assistance has been provided in more than 200 cases of child sexual exploitation of children who were not known to be missing, as well as in those cases of children believed to be missing. The Center has developed four books that are directly targeted at the problem of sexual exploitation: Child Pornography and Prostitution, Interviewing Child Victims of Sexual Exploitation, Child Molesters: A Behavioral Analysis, and Children Traumatized in Sex Rings. In addition we have a brochure for parents entitled Just in Case...Parental Guidelines in Case Your Child Might Someday Be the Victim of Sexual Abuse or Exploitation, and a brochure entitled, For Camp Counselors: Guidelines on Child Sexual Abuse and Exploitation. We have conducted training in the sexual exploitation of missing children for more than 22,000 professionals in law enforcement, social services and juvenile justice in 41 states. Finally, any reports of child pornography that the Center receives on the toll-free hotline are immediately passed on to the U.S. Customs Service of the Department of the Treasury. We also cooperate with and pass appropriate information on alleged sexual exploitation to the U.S. Postal Service and the Federal Bureau of Investigation.

## COMMENTS ON S.2033, THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT OF 1988

Great progress has been made in reducing the disgusting and shameful sexual exploitation of children since Congress first enacted the Protection of Children Against Sexual Exploitation Act of 1977[4]. In addition to the Child Protection Act of 1984[5], Congress passed the Child Sexual Abuse and Pornography Act of 1986[6] and the Child Abuse Victims' Rights Act of 1986[7], and states have been active in prohibiting sexual exploitation[8]. Federal and state law enforcement agencies have been actively investigating and prosecuting these cases, and training of law enforcement professionals in this area has been extensive and ongoing. Nevertheless, 47 key issues relating to child pornography were identified by the Recommendations of the Attorney General's Commission on Pornography as requiring legislative action, 8 of them requiring Congressional action. The enactment of S.2033 will be a major step in meeting those needs.

Recommendation 39, based on the experience of investigators in child pornography cases finding computer links between among those who consume, as well as those who produce, child pornography,[9] sought legislation "to prohibit the exchange of information concerning child pornography, or children to be used in pornography, through computer networks." Sections 101(a), (b) and (c), amending sections 2251(c)(2), 2252(a) and 2256 of Title 18 will do just that.

Recommendations 43 and 49 sought legislation to prohibit the parent, guardian, or other person who has custody or control over a minor from transferring such custody or control to another, knowing that the minor would be used in child pornography, and also the acceptance of such custody or control, knowing that the minor would be so used. (The Center is aware of several children who were missing due to parental abduction whose parent allowed others to sexually abuse and photograph the child.) While 1987 amendments to the federal rules[10] implementing the Prevention of Child Abuse and Neglect Act of 1974[11] require states as a condition of funding eligibility under that Act to authorize their child protective services agencies to investigate and provide services to such children, those amendments did not provide criminal penalties for the adult who permitted such exploitation of his/her child. Section 102 will provide this deterrent.

Recommendations 37 and 38 sought to eliminate the use of performers under the age of 21 in sexually explicit visual depictions, and to require the producers, retailers, and distributors of such material to maintain records of the performers' ages and consent. We have frequently been consulted by police and prosecutors during their preparations for prosecution of an alleged child pornography case as to whether there is expert testimony to prove that the age of the performer is under 18 when the performer appears to be an adolescent. Section 103 addresses this with respect to those performers under the age of 18.

The Center is concerned, however, whether the retroactive application of the 25 year standard in proposed section 2257(a)(1) might be a violation of due process. Given the furtive way such sexually explicit materials are produced, it may be difficult if not impossible to locate performers from past depictions in order to obtain the records. In addition, a performer who would now be considered a minor at the time of the depiction may have had adult legal status under state and federal law at that time. If the performer was an emancipated minor prior to 1977 (the enactment of the Protection of Children Against Sexual Exploitation Act), or was at least age 16 prior to the 1984 amendments to Sections 2243, 2251 and 2252 which defined a minor as anyone under the age of 18, the depiction was legal if not otherwise obscene. It may be necessary to limit the application of the record-keeping requirement to years following 1984, even though this clearly reduces the effectiveness of the record-keeping requirement.

The Center believes that Section 104 is also necessary to combat the production and distribution of child pornography. Although most child pornography involving young children is not produced for commercial profit,[12] the same is not necessarily true for child pornography involving adolescents. Therefore, the inclusion of sections 2251 and 2252, and proposed section 2251A of Title 18 in the Racketeer Influenced and Corrupt Organizations statute seems appropriate.

The Center also believes that Section 202(d) is an improvement over the existing criminal and civil forfeiture provisions of sections 2253 and 2254.

The Center supports section 203. We share the opinion of the National Obscenity Enforcement Unit of the Department of Justice that whether Congress has prohibited obscenity in the Cable Communications Policy Act[13] is unclear, and that this proposed section 1464A to Title 18 will help rectify the situation. The Center is frequently consulted by law enforcement and social services professionals as to whether a young child who has allegedly been sexually molested could instead be describing explicit sexual acts he or she observed on cable TV or subscription TV. We believe that this section will reduce the incidence of obscene material on cable and subscription TV to reduce such a possibility, and thereby help investigators verify whether the child was in fact sexually victimized.

Finally, we believe that proposed section 204 has been superceded by previous Congressional action this session in amending 47 U.S. Code 223.

COMMENTS ON S.703, THE PORNOGRAPHY VICTIMS PROTECTION ACT OF 1987

Although S.703, the Pornography Victims Protection Act of 1987, is worthwhile in intent, the Center believes that there are technical problems with it that may not only prevent accomplishment of the purpose for which it is proposed, but may also create problems for existing sections of Title 18.

The Center believes that proposed subsections (1) and (2) of Section 2, amending subsections (a) and (b) of 18 U.S.C. 2251 may be appropriate, but we believe that they may be superfluous under the existing subsections (a) and (b).

The Center believes that proposed subsection (3) of Section 2, adding a replacement subsection (c)(1) to 18 U.S.C. 2251 would be a grievous error. The proposed subsection would replace a provision that prohibits the advertisement of an offer to receive, exchange, buy, produce, display, distribute, or reproduce a visual depiction of child pornography with one that prohibits sexually explicit video depiction of adults, even if the depiction is not obscene, by means of coercion, intimidation or fraudulent inducement. We believe that the original subsection (c)(1) needs to be retained. We also believe that while the proposed subsection (c)(1) is needed, this is the wrong place for the proposed section regarding adults; we believe that it should be located in chapter 71 or in a new chapter of Title 18.

We believe that proposed subsection (c)(1) is constitutional. In New York v. Ferber,[14] the U.S. Supreme Court held that a government could prohibit child pornography even if it did not meet the legal standard of obscenity. In holding that child pornography was outside the protection of the First Amendment, the Court focused on the harm to the child victim/participant rather than on the harm obscenity causes to the viewer. By analogy, an adult who is visually depicted in sexually explicit conduct by coercion, intimidation, or fraudulent inducement also suffers serious harm, and the person who coerces, intimidates, or fraudulently induces the adult into participation can be prosecuted. Since the content of the material is not prohibited under this section, but rather the act that led to the production of the material, we do not believe that the proposed subsection violates the First Amendment.

Similarly, the Center does not believe that the replacement of existing subsection (c)(2) with the proposed subsection (c)(2) is wise, since the existing subsection provides the scienter requirement and the interstate or foreign commerce requirement for existing subsection (c)(1). The Center would also question whether subsection (c)(2) is constitutional. In our opinion such factors, especially paragraphs (H) and (I), may well, without more, negate a finding of coercion in the mind of a reasonable fact-finder. It would seem that this subsection imposes a form of strict liability with respect to an allegation of coercion that may not be permissible.

The Center supports the intent of proposed section 3, amending 18 U.S.C. 2252, but we prefer that it be enacted as a new section rather than as an amendment to section 2252.

Section 4 of the bill appears to have an error when it is cross-referenced to section 5(a). Existing section 2255 is not a definitions section, but rather one that provides a civil remedy for personal injuries to a minor victim of section 2251 or 2252. We do not believe that this provision which was added by the Child Abuse Victims' Rights Act of 1986,[15] should be repealed by implication.

We believe that section 4 has some other problems. First, subsection (a) in proposed section 2255 appears to us to be overbroad in granting injunctive relief to order any person to divest himself of any interest in any legal or business entity or imposing reasonable restrictions on the future activities or investments of any person. If the person who secured the participation of an adult by coercion, intimidation or fraudulent inducement did so without the knowledge of other participants in the production or distribution of explicit but non-obscene visual depictions of sexual acts, it is questionable whether the latter could legally be subjected to such sweeping injunctive relief.

Second, subsection (c) of proposed section 2255 provides for threefold damage recovery, but this may be less than the minimum of $50,000 damages in existing section 2255.

We believe that the civil forfeiture provisions proposed by S.2033 are superior to those proposed in section 2256, which we note, is the definitional section that will supposedly be re-designated section 2261

Finally, the Center believes that proposed section 2259 is mis-designated. The section is about closing the courtroom to the public, not about evidence proffered in the proceeding. We believe that this proposed section is constitutional, however. In Globe Newspaper Co. v. Superior Court,[16] the Supreme Court held that in a criminal proceeding, the trial court has discretion to close the court to the public when a minor is testifying about sexual victimization. Surely the trial court has similar discretion in a civil action or ancillary proceeding under chapter 110.

In conclusion, the National Center would be happy to answer any questions regarding our analysis of these two important pieces of legislation.

## REFERENCES

1. P.L. 98-473, 42 U.S.C. 5771 et seq.

2. Rabun, J.B., "Combatting Child Pornography and Prostitution: One County's Approach," in Burgess, A.W. (ed.) Child Pornography and Sex Rings (1984).

3. Lanning, K.V., "Collectors," in Burgess, A.W. (ed.) Child Pornography and Sex Rings (1984).

4. P.L. 95-225.

5. P.L. 98-292.

6. P.L. 99-628.

7. P.L. 99-691.

8. Davidson, H.A. and Loken, G.A., Child Pornography and Prostitution (1987)

9. Report of the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate, 99th Congress 2d Session, October 9, 1986.

10. 45 C.F.R. Sec. 1340.2(d)(1)

11. P.L. 93-247, as amended, 42 U.S.C. 5101 et seq.

12. Report of the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate, 99th Congress 2d Session, October 9, 1986.

13. P.L. 98-549

14. 458 U.S. 747 (1982)

15. P.L. 99-628, 18 U.S.C. 2255

16. 457 U.S. 596 (1982)

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 16, 1988

The Honorable Dennis DeConcini
United States Senate
328 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator DeConcini:

The Senate Judiciary Committee recently received a letter from Ms. Elizabeth Youmans Kepley of Concerned Women for America. Enclosed you will find a copy of her letter in which she requests that you include her organization's "Policy Concerns" paper in the record of the hearing on S.2033, the Child Protection and Obscenity Enforcement Act of 1988.

I would appreciate your staff confirming with our office, via Jennifer Veley at 4-5225, the inclustion of the "Policy Concerns" paper in the hearing record.

Thank you for your attention.

Sincerely,

Diana Huffman

Diana Huffman
Staff Director

Enclosure

JOSEPH R BIDEN JR DELAWARE CHAIRMAN
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 16, 1988

Ms. Elizabeth Youmans Kepley
Director, Legislative Affairs
Concerned Women for America
370 L'Enfant Promenade, S.W.
Suite 800
Washington, D.C. 20024

Dear Ms. Kepley:

Thank you for contacting Senator Biden regarding S.2033, the Child Protection and Obscenity Enforcement Act of 1988. As you may know, the Senator is currently out of the office due to illness; however, he is doing well and will be back full-strength in the Senate after his recuperation.

On behalf of Senator Biden, I would like to thank you for the active interest of your officers and members in this important legislation. I have forwarded a copy of your letter and the "Policy Concerns" paper to Senator Dennis DeConcini, who presided over the June 8, 1988 full committee hearing on this bill. I have requested that Senator DeConcini's staff confirm with our office the inclusion of your statement in the record.

Again, thank you for contacting Senator Biden regarding this issue. Please feel free to write to the committee if our staff can provide further information while the Senator is out of the office.

Sincerely,

Diana Huffman

Diana Huffman
Staff Director

Concerned Women for America
370 L'ENFANT PROMENADE, S.W., SUITE 800 WASHINGTON, D.C. 20024 (202) 488-7000

**Beverly LaHaye**
President

June 8, 1988

The Honorable Joseph Biden, Jr.
Chairman
U.S. Senate Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Senator Biden,

Thank you for holding hearings on S. 2033, The Child Protection and Obscenity Enforcement Act of 1988 today. It is our hope that this piece of legislation, if implemented, would tighten the laws regarding the use of children in the pornography industry and the various provisions regarding obscenity.

It is our request that the enclosed Policy Concerns paper written and printed by Concerned Women for America be placed in the record as pertaining to today's hearings.

Thank you.

Sincerely,

Elizabeth Youmans Kepley
Director
Legislative Affairs

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Enclosure

"Protecting the rights of the family through prayer and action"

Concerned Women for America
Education & Legal Defense Foundation

Beverly La Haye
President

# POLICY CONCERNS

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## THE CHILD PROTECTION AND OBSCENITY ENFORCEMENT ACT
## SLAMMING THE DOOR ON HARD-CORE PORN

### I. INTRODUCTION

The Child Protection and Obscenity Enforcement Act of 1988 was introduced as H.R. 3889 in the House of Represenatives and S. 2033 in the Senate. As of May 19, 1988, there are 203 co-sponsors in the House and 37 in the Senate.

These measures are the result of recommendations by the Attorney General's 1986 Commission on Pornography. President Reagan proposed the legislation in November, 1987 after careful consideration and extensive study of the Commission's findings.

For years, the controversy surrounding pornography focused on the rights of the buyer and seller to the exclusion of the rights of the victim. The Attorney General's Commission was the first successful attempt to identify and direct attention to the victimized third party and to demonstrate that pornography has changed dramatically in its scope and deviancy.

### II. PORNOGRAPHY'S EFFECTS

The 1970 Presidential Commission on Obscenity and Pornography concluded that pornography was harmless and might even have some therapeutic value. After the release of this report, the pornography industry exploded into the repulsive world of hard-core, sexually explicit, degrading, and violent obscenity. Pornographic material depicting nudes posing alone, prevalent in the late 60s and early 70s, became largely passe.[1]

Cognizant of the escalation in deviancy, President Reagan and Attorney General Edwin Meese requested a new study to "determine the nature, extent, and impact on society of pornography in the United States...." The results of the 1986 Commission's 14-month exhaustive study clearly indicate that pornography is a public health danger.

## Nonviolent Pornography

Dr. Dolf Zillmann of Indiana University and his colleague Dr. Jennings Bryant of the University of Houston have conducted the most research on nonviolent pornography and its effects. After observing three separate control groups and their reactions to certain films, Zillmann and Bryant observed that groups that have been exposed to pornography become bored with the ordinary and desire stronger, more bizarre versions. "Persons are suddenly dissatisfied with what they are so familiar with. There seems to be an indication that they are now ready to go for more. The usual is no longer good enough, and there has to be more. And this 'more,' of course, means bizarre sex or violent sex."

In further research, Zillman found that massively exposed groups demonstrated far less concern over the effects of pornography than did groups that had not been exposed. This finding suggests that people's perception of what is normal and innocuous is altered by the viewing of pornography. It changes their attitudes about what are normal sex practices.

Another significant discovery is that after viewing this material (frequently degrading to women), the control groups' (men and women) attitudes toward rape had dramatically changed. Rape was viewed as a lesser crime and the victim was frequently held more responsible while the rapist was frequently viewed as less responsible. In essence, the degradation and humiliation of women seemed far less injurious.[2]

## Violent Pornography

Dr. Edward Donnerstein of the University of Wisconsin has extensively researched the effects of violent pornography. During one study, he selected 156 males, divided them into groups, and showed each group a sequence of films ranging from R-rated, sexually violent, and nonviolent X-rated. The results demonstrated that the groups were still aroused by the material shown but had become desensitized to the violence and degradation of women.[3]

Dr. Daniel Linz of the University of Wisconsin, studied the effects of violent pornography on sixty subjects judged more prone than the average person to become hostile when viewing this material. After exposing them to two violent pornographic movies, Linz stated, "Experimental evidence suggests quite strongly that there is an identifiable, indeed quantifiable, harm arising from exposure to this material. The research conducted to date defines the specific type of material likely to incite aggression against women to be portrayals of rapes, or other forms of sexual assault which show the female victim becoming involuntarily sexually aroused, or otherwise responding to sexual aggression." He also found that the probability that an individual will be motivated to reproduce what he observed is definitely increased with the viewing of this material.[4]

## Sex Offenders

Dr. William Marshall, in an examination of sexual deviants and their use of pornographic material, found that 83 percent of the rapists studied used hard-core pornography. Marshall concluded that, in many cases, the pornographic material triggered their rape fantasies.[5]

Marshall also discovered that 64 percent of the homosexual child molestors and 86 percent of the rapists studied currently used pornography.[6]

In Louisville, Kentucky, the review of 1400 child molestation cases indicated that the use of adult pornography was involved in 100 percent of the cases and child pornography in 50 percent.[7]

Dr. Marshall's study of 89 sex offenders established that more than one-third of the child molestors admitted to at least occasionally being incited to commit an offense by exposure to forced or consenting pornography.[8]

Child molestors were also found to use pornography more often that rapists in adulthood for three reasons: 1. to stimulate themselves; 2. to break down the conscience and inhibitions of the child; and 3. as a teaching tool.[9]

## Child Performers

Child pornography, works that visually depict sexual conduct by children below a specified age, was not a problem addressed by the 1970 Commission, but the 1986 Commission discovered that child pornography and child prostitution have become highly organized, multi-million dollar industries. Today, Los Angeles alone reports 30,000 sexually abused children.

Children exploited by the pornography industry are often runaways, homeless youth, or prostitutes. Many are sold and/or used by a parent or guardian.

The emotional trauma suffered by the children used in pornography is devastating. Most children experience depression, suicidal thoughts, guilt, shame, alienation from family and peers, and massive acute anxiety. The long term effects are low self esteem, anxiety regarding sexuality, and role confusion, with many exploited children becoming abusers themselves.

## Adult Performers

Men and women used by the pornography industry have, until now, been considered consenting adults. Until the 1986 Commission study, most did not realize that men and women are frequently coerced into performing the sex acts required of them. Performers are brutally beaten, threatened, and/or drugged by their pimps or "talent scouts."

In the 1986 Commission hearings, heart-rending testimonies proved that in many cases the performers, whether they were prostitutes or abducted persons, did not consent but were forced to participate in the degrading and humiliating acts depicted in pornographic material.

## Sexual Crime Statistics

Current crime statistics indicate, in no uncertain terms, the devastating effect child pornography and obscenity have had on our country. The sexual abuse of children rose over 175 percent between 1981 and 1985 with estimates of juvenile prostitution ranging from 100,000 to 200,000 children selling their bodies daily. Rape rose over 700 percent since World War II, with a 43 percent increase in the last decade.

## III. LEGISLATION

In reviewing the legislative recommendations of the Attorney General's Commission, 11 basic areas of weakness surfaced. The Child Protection and Obscenity Enforcement Act addresses all 11 areas by either closing loopholes or updating existing legislation to address technological advancements.

### Sexual Exploitation of Children Through Child Pornography

Section 101 (Amending 18 USC 2251, 2252) Use of Computers: A loophole in the 1984 Sexual Exploitation of Children statutes allows child pornography and related information to pass through computer networks. Child porn producers and suppliers with access to a personal computer and modem can tap into this system and receive information ranging from files on the children used to actual pornographic material (laser printer needed). This provision would strengthen and expand current federal law to prohibit the use of computers to advertise, distribute, or receive child pornography and related information.

Section 102 (Adding 18 USC 2251[A]) Buying and Selling Children: Existing federal statutes prohibit the interstate transportation of children for sexual purposes but do not prohibit a parent or guardian (babysitter or day care worker) from selling or offering to sell a child for use in the production of pornography. This provision will add such a prohibitive section to current statutes.

Section 103 (Adding 18 USC 2257) Recordkeeping: The pornography industry is not currently required to keep records on the identity and age of performers. Not requiring this information makes it much easier for producers to use minors. Under this provision, the producers will be required to keep verifiable records on all performers and have them readily accessible. If a distributor sells material without a statement concerning the ages and identity of performers or where the information can be obtained, the burden will be on him or her to prove that the performers were indeed adults.

Section 104 (Amending 18 USC 1961, et. seq.) Child Pornography and the RICO Statute: The Racketeer Influenced and Corrupt Organizations (RICO) statute provides strong penalties and the forfeiture of assets for a pattern of racketeering activity in which a criminal organization is involved and the proceeds from the activity are used to further their enterprise. If an organization has committed two or more federal violations (covered in the statute as "predicate" offenses like murder, kidnapping, gambling, fraud, obscenity, etc.) and is using the money gained to further its enterprise, then the organization can be prosecuted under the RICO statute. However, current law does not include child pornography as a predicate offense. This provision would add child pornography to the RICO statute as a predicate offense.

## Obscenity Provisions

Section 201 (Adding 18 USC 1466) Interstate Transportation: Under current law, it is illegal to transport obscene material across state lines but it is not illegal to possess material that was produced in another state. The loophole is that the vehicle has to be caught in its travel before you can prosecute. This provision closes the loophole by prohibiting receipt and possession of obscene material with intent to sell or transfer it. This section also creates a rebuttable presumption that one who offers to sell or transfer two or more obscene materials or publications is engaged in the business of selling.

"Syndicate Busters": The following three provisions tailor federal law to address the organized crime entities that control 85-90 percent of the $7-10 billion pornography industry.

Subsection 201-C (Amending 18 USC 1465) Interstate Transportation Facility or Means: This provision would amend the statutes to outlaw the use of a "facility or means" of interstate commerce for obscenity trafficking. It would prohibit the use of federal interstate highways and railroads and any means of interstate commerce including motor vehicles, boats, and airplanes. Proof of interstate travel would not be necessary as long as the use of a "facility or means" of commerce could be proven.

Subsection 201-D (Adding 18 USC 1469) Presumption of Interstate Transport: Another major loophole in current law is that proof of the interstate nexus is required. Organized crime entities hinder investigation and avoid prosecution by owning the entire chain from production to sales. This provision provides that if material known to have been produced in one state surfaces in another a jury can presume that the material travelled in interstate commerce. This would also apply to material produced in a foreign country.

Subsection 201-F (Amending 18 USC 1952) Acts Furthering Illegal Activity: This amendment will make illegal any act or communication (interstate or international) regarding the furtherance of activity which is illegal under state or federal obscenity and child pornography statutes. An example of this activity would be a phone call regarding the shipment of obscene material. This activity would also be a RICO predicate act.

Section 202 (Adding 18 USC 1467 and 1468) Forfeiture of Assets: This provision would provide for government confiscation of the ill-gotten, illegal assets gained from obscenity trafficking. The drafters of this legislation realize that the only way to shut down these operations is to provide for the forfeiture of their assets. The dismantling of these enterprises requires more than the prosecution and removal of the current management.

Section 203 (Adding 18 USC 1464[A]) Cable and Satellite Television: Current statutes do not prohibit obscenity on cable or satellite networks. This provision will strengthen federal law to prohibit obscenity on these networks.

Section 205 (Adding 18 USC 1460) Use of Federal Lands: Current law does not apply to the sale or transfer of obscene material on federal property. This regulation will make the sale/transfer of this material on federal lands a felony and the mere possession of child pornography on these lands a misdemeanor.

Section 206 (Amending 18 USC 2516) Electronic Surveillance: The final obscenity provision will allow the opportunity to seek a court order for a wiretap in obscenity prosecutions. Current federal law does not provide for this basic tool of investigators and prosecutors.

## IV. OPPOSITION'S ARGUMENT

Advocates of the right to buy and sell pornography continue to scream censorship. The American Civil Liberties Union and other opponents of this legislation attempt to use the First Amendment to facilitate their defense of this perverted industry. However, the U.S. Supreme Court has ruled several times that obscenity is expressly not protected by the Constitution.

Roth v. United States: The Supreme Court voted 5 - 4 to uphold the convictions of two pornographers. In writing the majority opinion, Justice William Brennan stated, "Although this is the first time the question has been squarely presented to the Court ... expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."

Paris Adult Theatre I v. Slayton: Chief Justice Warren E. Burger, writing for the majority, stated, "We categorically disapprove the theory ... that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited to consenting adults only."

Kaplan v. California: The Supreme Court upheld a lower court's decision concerning the obscene nature of certain material (even though it contained no pictures) and Justice Burger, stating the opinion of the majority, wrote, "When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of expression."

Despite these three prominent Supreme Court decisions and numerous others strengthening the Court's stance, the ACLU and its allies continue to insist that the Constitution protects obscenity. Their absurd insistence in this regard only serves to confirm the assertions that these groups stand to benefit significantly from the perpetuation of this multi-billion dollar industry. (Note: Playboy has contributed about $150,000 to the ACLU according to Burton Joseph, chairman of the Playboy Foundation).

## V. CONCLUSION

The 1986 Commission's findings clearly demonstrate that pornography is a public health and safety problem. Furthermore, the fact that the Administration perceives a need for this comprehensive legislative package indicates the weakness of federal law.

Every aspect of Attorney General Edwin Meese's initiative to curb the growth in obscenity and pornography has been implemented with the legislative package being the only exception. Passage of this legislation is crucial to the success of the National Obscenity Enforcement Unit and its newly-devised federal, state, and local task force.

The proliferation of child pornography and obscenity threatens the lives of our citizenry and should be severely prosecuted. In the speech unveiling this legislation, President Reagan stated, "With this Act and the implementation of the Attorney General's plan ..., this administration is putting the purveyors of obscenity and child pornography on notice: Your industry days are numbered...." Congress must provide the Administration with the tools necessary to dismantle this life-threatening exchange. No longer can our nation tolerate an industry that markets and encourages exploitation and abuse.

## ENDNOTES

1. According to Commission reports, the new arena of obscenity features blatent and graphic sexual acts such as homosexuality, beastiality, incestuous relationships with parents and children, and group sex. Other material focuses on sexual stimulation through mutilation, rapes, and details of the homosexual lifestyle.

2. David Scott, ed., Proceedings of the Symposium on Media Violence and Pornography, (Toronto: Media Action Group), February 1984, 96.

3. Tom Minnery, ed., Pornography: A Human Tragedy, (Christianity Today, Inc.), October 1986, pp. 127-132.

4. Daniel G. Linz, "Sexual Violence in the Media: Effects on Male Viewers and Implications for Society," Ph.D. diss. (University of Wisconsin at Madison), 1985, 38-41.

5. W. Marshall. Testimony submitted to the Attorney General's Commission on Pornography, Washington, D.C., 12 September 1985.

6. David Alexander Scott, "Pornography -- Its Effects on the Family, Community and Culture," (The Free Congress Foundation), 1985, 9.

7. Information obtained from a personal interview with the Executive Director of the National Obscenity Enforcement Unit.

8. U.S. Department of Justice, The Final Report of the Attorney General's Commission on Pornography, (Rutledge Hill Press), 1986, 266.

9. Ibid.

HBO
John S. Redpath, Jr.
Senior Vice President
& General Counsel

June 24, 1988

The Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
489 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Home Box Office, Inc. ("HBO") is pleased to comment on S. 2033, the Child Protection and Obscenity Enforcement Act of 1988. HBO commends the efforts of those seeking to destroy child pornography. HBO has never exhibited obscene programming and does not oppose those aspects of the bill which further regulate obscenity. However, Section 1464A(c) of the bill purports to grant authority to states and municipalities to regulate non-obscene, so-called "indecent" programming on cable television or subscription services. Because Section 1464A(c) could cause substantial harm to the nationwide system of program distribution to viewers and violate the guarantees of the First Amendment, HBO believes that section is not in the public interest and should be deleted.

## HBO's Services

HBO is a wholly-owned subsidiary of Time Inc. HBO programs and distributes via satellite three pay channel services to cable television subscribers and other viewers throughout the country. These services, HBO, Cinemax and Festival, provide a full range of programming, from award winning children's shows such as Fraggle Rock to R-rated theatrical motion picture films. HBO does not exhibit either X-rated or obscene programming.

HBO's services are available only to subscribers who choose monthly to receive and pay for them. Pursuant to the Cable Act which Congress passed in 1984, all cable subscribers may request from their cable operator a "lock box" to control access within their homes to such channels. In addition, HBO provides both on-air announcements and program guide information to identify programming that some viewers may find objectionable. Furthermore, HBO also targets programming to times of the day based on the likely viewing audience, i.e., daytime for children's shows or general audience movies, late on weekend evenings for films appealing solely to adult audiences and no R-rated programs before 8 P.M. Eastern time.

Home Box Office, Inc.
1100 Avenue of the Americas New York, NY 10036 (212) 512-1055

HBO's services are distributed by satellite via two feeds (based on the Eastern and Pacific time zones) to provide uniform, nationwide programming to thousands of cable operators and millions of subscribers in a multitude of diverse communities. Because of the technical requirements for satellite distribution, as well as other considerations, HBO's programming cannot be tailored precisely to the desires or beliefs of every community or state.

Nonetheless, the interests of HBO and its subscribers in diverse programming and the views of some municipalities and state legislatures have conflicted before. These conflicts have been resolved by the courts in favor of HBO (1) because the laws of individual states or municipalities abridged the national policy of the Communications Act in favor of the broadest possible dissemination of information and (2) because the standards relied upon, i.e., bans on "indecent" programming, are unduly vague under the First Amendment and are susceptible to arbitrary, administrative discretion. Most recently, the Supreme Court affirmed this position. See, e.g. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1895), aff'd sub nom., Jones V. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd per curiam, 107 S. Ct. 1559 (1987); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) Cf. Capital Cities Cable, Inc. v. Crisp, 4676 U.S. 691 (1984). (Copies of the Wilkinson and Cruz decisions and HBO's brief to the United States Supreme Court seeking affirmance of Wilkinson are attached for ease of reference.)

## Position of HBO

Section 1464A(c) of S. 2033 is a troublesome portion of the bill. While all other portions of the bill relate to the regulation of "obscenity", that section, without explanation, attempts to grant states, municipalities and other governmental units authority to regulate "indecent" programming. Not only is "indecency" undefined (and probably incapable of definition, see Action for Children's Television v. FCC, No. 88-1064 (D.C. Cir. 1988) (appeal pending from FCC's regulation of "indecent" programming on broadcast television")), but more importantly, no rationale is provided or apparent for this single intrusion into the regulation of non-obscene programming.

HBO is deeply concerned that any change in existing law to attempt to grant individual states or municipalities greater discretion to regulate programming will lead to further litigation and expense.[1] Ultimately, a disparate set of rules would decrease the flow of information to all consumers. The effect of allowing a single state, or even worse, a multitude of other jurisdictions, to enforce such a content restriction could be to force the elimination of some cable services from such a state or jurisdiction or perhaps to alter the national presentation to conform to a standard set by a minority of communities. Either result would harm consumers who have affirmatively chosen to subscribe to a particular service or channel. Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 707-08. Such an effect seems particularly unnecessary where other far less intrusive alternatives are available, i.e., "lock boxes" or switching off the television set in response to a program announcement.

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[1] The costs of such litigation may ultimately be imposed upon the respective states and municipalities. HBO recovered its attorneys fees and costs from the defendant governmental bodies in both the Cruz and Wilkinson cases.

Most fundamentally, there has been no showing of a substantial governmental interest in regulation of non-obscene programming. States and municipalities have not shown that their inability to regulate non-obscene fare has harmed viewers. Any such harm, if it could be shown, is outweighed by the loss to the First Amendment, the nationwide communications system and the interests of subscribers who desire to view non-obscene programming that other viewers may find offensive.

HBO submits that these and other important questions concerning Section 1464A(c) have not been addressed. If they were, the rationale for that section would be found wanting and the harm to other important interests substantial. HBO, therefore, respectfully suggests that Section 1464A(c) be deleted in its entirety, if Congress chooses to proceed at all with the proposed bill. Indeed, Utah voters, among others, rejected an attempt to approve a ban on "indecent" programming.

HBO appreciates the opportunity to submit these comments and requests that they be placed in the hearing record. HBO, of course, would be pleased to discuss these issues further or to respond to questions of the Committee, Members or staff.

Sincerely yours,

John S. Redpath, Jr.

John S. Redpath, Jr.

Recording Industry Association of America, Inc.

**Hilary B. Rosen**
Vice President/Government Relations

July 5, 1988

The Honorable Joseph R. Biden
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C.  20510

Dear Mr. Chairman:

Attached, please find the statement of Jason Berman, President, Recording Industry Association of America (RIAA) on S. 2033, "The Child Protection and Obscenity Enforcement Act of 1988". RIAA is a non-profit trade association of record companies. Our members produce over 90% of music sold in the United States.

RIAA strongly opposes this legislation for three principle reasons: 1) it is simply impossible to determine what standards and perspectives will be used to define obscenity 2) the bill will have a chilling effect on other legitimate forms of speech and 3) music lyrics are suceptible to multiple interpretations depending upon the listeners' attitudes and feelings.

I respectfully request that this statement be made a part of the hearing record on this legislation.

Sincerely,

Hilary B. Rosen

HBR/rm

Attachment

cc: Members of the Judiciary Committee

1020 Nineteenth Street, N.W., Suite 200 • Washington, D.C. 20036 • Telephone: 202/775-0101

# Statement of Jason S. Berman, President, Recording Industry Association of America on S. 2033 before the Senate Judiciary Committee

The Recording Industry Association of America (RIAA) appreciates the opportunity to submit its comments on S. 2033, the "Child Protection and Obscenity Enforcement Act of 1988". RIAA is a trade association of recording companies. Our members market approximately 85% of all sound recordings sold in the United States.

RIAA record companies, songwriters, recording artists, and musicians all share a common interest in preserving the artistic freedom of expression of our creative community. That is why the RIAA strongly opposes legislation currently before the Committee (S. 2033) which would curtail our right to express legitimate ideas through music and art, and which would limit the rights of the music consuming public to have access to those creative expressions. These comments are limited to those provisions of the bill dealing with obscenity; we do not oppose that portion of the bill concerning child pornography.

The proposed legislation prohibits obscenity in the same manner that recent federal statutes restrict drugs and narcotics. The bill would criminalize the receipt or possession of any obscene material held for sale or distribution and would impose stiff penalties and forfeiture provisions under both civil and criminal proceedings. Whatever the merits or demerits of such restrictions in the context of a national drug problem, obscenity legislation must be recognized to be a totally different kind of issue. Solutions which may be appropriate in the drug trafficking context may be wholly inappropriate in the obscenity area. This is especially the case here, where the illicit activity closely borders a constitutionally protected right.

Creative expression has long been recognized as a fundamental tenet of American democracy. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech...." U.S. Const. amend. I. This guarantee encompasses not only the right to speak, but also the right to hear. Along with other provisions in the Bill of Rights, the freedom of speech is an essential component of our constitutionally-guaranteed civil liberties. As such, freedom of speech is a crucial factor in consideration of any law which purports to limit the expression or dissemination of ideas and opinions.

The RIAA strongly opposes the proposed federal solution to the problem of obscenity for three reasons: 1) the difficulty in determining what standards and perspectives will be used to define obscenity, 2) the chilling effect on other legitimate forms of speech, and 3) the susceptibility of lyrics to multiple interpretations.

We recognize that, according to the Supreme Court, obscenity falls outside the realm of protected speech, Roth v. United States, 354 U.S. 476 (1957), but nonetheless, what constitutes obscenity cannot be judged by national standards. Miller v. California, 413 U.S. 15, 24 (1972). As noted by the Court, the application of uniform national standards would inevitably make some information unavailable in areas where it would be acceptable by local standards. Id. at 32, n.13. Accordingly, the Court held that obscenity must be evaluated by reference to local community standards, id. at 24, and it thereby avoided the chilling effect on speech likely to result from application of a national standard. Thus, the definition of obscenity varies widely among states and regions, depending on social preferences and cultural attitudes.

Unfortunately, and contrary to the approach of the Court in Miller, the bill before the Committee would prohibit the receipt or possession of obscene material for sale or distribution as a matter of federal law, under Congress' power to regulate interstate commerce. Although the bill purports to reflect a federal interest, it does not -- and as a practical matter, it cannot -- define a federal standard for obscenity. This raises the inevitable question of what standards will be used to define obscenity? Record producers, distributors, and retailers would become legitimately confused and uncertain as to whether the new bill federalizes local community standards. And if so, which is the community standard to be applied? Does the strictest definition of obscenity apply to all regions? Or does the least restrictive definition apply? If local community standards still apply, how are they changed by additional federal interests?

Such ambiguity as to the appropriate standards of obscenity will necessarily chill all forms of free speech, including legitimate, non-obscene speech. Record companies, distributors, and retailers will become overly cautious in promoting even constitutionally protected speech for fear that they will be subject to felony convictions, harsh fines, and other penalties for material that some court or some jury, determining local community standards in some community, somewhere in the United States may later determine is obscene. Their fears are exacerbated by the expansive forfeiture provisions of the bill which threaten producers, distributors, and retailers alike with seizure of any property used to "commit" an offense or to "promote" obscene material.

The proposed legislation is not only confusing, but it also makes it easier in two respects for federal prosecutors to bring charges against innocent and unsuspecting record producers, retailers, and distributors. First, the bill makes it a crime to "knowingly receive or possess with intent to distribute any obscene" material, without requiring that an individual know that the material is obscene. It appears only to require that an individual intend to receive or possess the material and that he know of its general contents.

In the second instance, the proposed legislation drastically alters the burden of proof in civil and criminal prosecutions. The bill creates rebuttable presumptions that individuals are "engaged in the business of selling obscene articles" and that the articles were transported through foreign or interstate commerce. All that is required is that an individual sell two or more of any "obscene" article or publication or a combined total of five "obscene" items and that such items were produced in a different state or nation.

While these two amendments may make it easier for the prosecution to prove its case against pornography syndicates, they also undoubtedly will result in needless prosecutions of innocent record producers, retailers, and distributors. Such an increase in prosecutorial power is not justified when it will unnecessarily limit legitimate speech protected by the First Amendment. Such a shift in presumptions is not legitimate when the freedom of speech is presumed to be a fundamental right.

Not only will the proposed federal legislation chill legitimate speech, damaging American music listeners' and buyers' ability to hear and purchase the creative expression of their choice, but it will also disrupt the orderly functioning of our existing nationwide distribution network for the dissemination of recorded music. That distribution network has served to make available to all segments of our population, in all regions of our nation, the broadest and most diverse variety of musical material anywhere in the world. To limit it would be a severe and unwarranted restriction on the rights of all Americans.

Finally, it is important to note the unique characteristics of lyrics. Words are always susceptible to many different interpretations, but never more so than in poetry or lyrics. Unlike many other forms of artistic expression, inferences drawn from particular combinations of words largely reflect the different experiences and perspectives of listeners. In this context, who is to say what is "obscene?" What is uncommon language in a rural community may be totally appropriate for an urban neighborhood, and it is unfair to force one community to bow to the standards of another, especially when they may be judged in light of their own experiences and perspectives.

For all of these reasons, the RIAA and its member companies strongly oppose the obscenity provisions of S. 2033 and encourage the Committee to eliminate those portions of the bill. As stated earlier, we do not oppose those portions of the bill dealing with child pornography. We believe, however, that the proposed obscenity legislation will severely chill legitimate expressions of speech by creating ambiguous standards for judging obscenity and by imposing harsh penalties and fines on unsuspecting parties. It will also chill legitimate speech by increasing prosecutorial powers and creating presumptions against innocent producers, retailers, and distributors. In the final analysis, we believe the proposed legislation will unnecessarily limit the artistic expression of the American creative community, and necessarily infringe upon the right of Americans to choose that which they wish to hear.

Thank you for the opportunity to express our views on S.2033.

II

100th CONGRESS
1st Session

# S. 703

To amend title 18, United States Code, including the Child Protection Act, to create remedies for children and other victims of pornography, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

March 10, 1987

Mr. Specter (for himself and Mr. McConnell) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To amend title 18, United States Code, including the Child Protection Act, to create remedies for children and other victims of pornography, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Pornography Victims Protection Act of 1987".

Sec. 2. Section 2251 of title 18, United States Code, is amended—

(1) in subsection (a), by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)" and by inserting before the period at the end thereof the

following: "or if such person knows or has reason to know that the minor was transported in interstate or foreign commerce for the purpose of producing any such visual depiction of such conduct";

(2) in subsection (b), by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)" and by inserting before the period at the end thereof the following: "or if such person knows or has reason to know that the minor was transported in interstate or foreign commerce for the purpose of producing any such visual depiction of such conduct";

(3) by inserting immediately after subsection (b) the following:

"(c)(1) Any person who coerces, intimidates, or fraudulently induces an individual 18 years or older to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if such visual depiction has actually been transported in interstate or foreign commerce or mailed, or if such person knows or has reason to know that the individual 18 years or older was transported in interstate or foreign commerce for the purpose of producing any such visual depiction of such conduct.

"(2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion under this subsection:

"(A) that the person is or has been a prostitute;

"(B) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography;

"(C) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography;

"(D) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue;

"(E) that anyone else, including a spouse or other relative, has given permission on the person's behalf;

"(F) that the person actually consented to a use of the performance that is changed into pornography;

"(G) that the person knew that the purpose of the acts or events in question was to make pornography;

"(H) that the person signed a contract to produce pornography; or

"(I) that the person was paid or otherwise compensated.";

(4) in subsection (c), by striking out "(c)" and inserting in lieu thereof "(d)"; and

(5) by amending the heading to read as follows: **"§ 2251. Sexual exploitation".**

SEC. 3. (a) Section 2252(a)(1) of title 18, United States Code, is amended by adding at the end thereof the following:

"(C) the producing of such visual depiction involved the use of an adult who was coerced, intimidated, or fraudulently induced to engage in sexually explicit conduct and the person knows or has reason to know that the adult was coerced, intimidated, or fraudulently induced; and

"(D) such visual depiction depicts such conduct; or".

(b) Section 2252(a)(2) is amended by—

(1) striking out "and" and the semicolon in clause (A) and inserting in lieu thereof "or the production of visual depiction involved the use of an adult who was coerced, intimidated, or fraudulently induced to engage in sexually explicit conduct and the person knows or has reason to know that the adult was coerced, intimidated, or fraudulently induced; and".

(c) The heading for section 2252 is amended to read as follows:

**"§ 2252. Certain activities relating to material involving sexual exploitation".**

SEC. 4. (a) Chapter 110 of part I of title 18, United States Code, is amended by redesignating section 2255 as section 2261.

(b) Chapter 110 of part J of title 18, United States Code, is amended by inserting after section 2254 the following:

**"§ 2255. Civil remedies.**

"(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 2251 or 2252 by issuing appropriate orders, including—

"(1) ordering any person to divest himself of any interest, direct or indirect, in any legal or business entity;

"(2) imposing reasonable restrictions on the future activities or investments of any person including prohibiting such person from engaging in the same type of legal or business endeavor; or

"(3) ordering dissolution or reorganization of any legal or business entity after making due provision for the rights of innocent persons.

"(b) The Attorney General or any person threatened with loss or damage by reason of a violation of section 2251 or 2252 may institute proceedings under section (a) and, in the event that the party bringing suit prevails, such party shall recover the cost of the suit, including a reasonable attorney's fee. Pending final determination, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper. For purposes of this section, a violation of section 2251 or 2252 shall be determined by a preponderance of the evidence.

"(c) Any victim of a violation of section 2251 or 2252 who suffers physical injury, emotional distress, or property damage as a result of such violation may sue to recover damages in any appropriate United States district court and shall recover threefold the damages such person sustains as a result of such violation and the cost of the suit, including a reasonable attorney's fee. For purposes of this section, a violation of section 2251 or 2252 shall be determined by a preponderance of the evidence.

"(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.

"(e) Nothing in this section shall be construed to authorize any order restraining the exhibition, distribution or dissemination of any visual material without a full adversary proceeding and a final judicial determination that such material contains a visual depiction of sexually explicit conduct, as defined by section 2261 of this chapter, engaged in by a minor or by a person who was coerced, intimidated, or fraudulently induced to engage in such sexually explicit conduct.

**"§ 2256. Civil penalties.**

"(a) Any person found to violate section 2251 or 2252 by preponderance of the evidence shall be liable to the United States Government for a civil penalty of $100,000 and the forfeiture of any interest in property described in section 2254. The Attorney General may bring an action for recovery of any such civil penalty or forfeiture against any such person. If the Attorney General prevails he may also recover the cost of the suit, including a reasonable attorney's fee.

"(b) If the identity of any victim of an offense provided in section 2251 or 2252 is established prior to an award of a civil penalty made to the United States under this section, the victim shall be entitled to the award. If there is more than one victim, the court shall apportion the award among the victims on an equitable basis after considering the harm suffered by each such victim.

**"§ 2257. Venue and process.**

"(a) Any civil action or proceeding brought under this chapter may be instituted in the district court of the United States for any district in which the defendant resides, is found, has an agent, or transacts his affairs.

"(b) In any action under section 2255 or 2256 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal of such judicial district.

"(c) In any civil or criminal action or proceeding under this chapter in the district court of the United States for any judicial district, a subpoena issued by such court to compel the attendance of witnesses may be served in any other judicial district except that no subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

**"§ 2258. Expedition of actions.**

"In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine the action. The judge designated to hear and determine the action shall assign the action for hearing as soon as practicable and hold hearings and make a determination as expeditiously as possible.

**"§ 2259. Evidence.**

"In any proceeding ancillary to or in any civil action instituted under this chapter the proceedings may be opened or closed to the public at the discretion of the court after consideration of the rights of affected persons.

**"§ 2260. Limitations.**

"A civil action under section 2255 or 2256 of this chapter must be brought within six years from the date the violation is committed. In any such action brought by or on behalf of a person who was a minor at the date the violation was committed, the running of such six-year period shall be deemed to have been tolled during the period of such person's minority.".

SEC. 5. (a) The section analysis for chapter 110 of part I of title 18, United States Code, is amended to read as follows:

## "CHAPTER 110—SEXUAL EXPLOITATION

"Sec.
"2251. Sexual exploitation.
"2252. Certain activities relating to material involving sexual exploitation.
"2253. Criminal forfeiture.
"2254. Civil forfeiture.
"2255. Civil remedies.
"2256. Civil penalties.
"2257. Venue and process.
"2258. Expedition of actions.
"2259. Evidence.
"2260. Limitations.
"2261. Definitions for chapter.
"2262. Severability.".

(b) The chapter analysis for part I of title 18, United States Code, is amended by striking the item relating to chapter 110 and inserting in lieu thereof the following:

**"110. Sexual Exploitation ........................................................................ 2251".**

SEC. 6. Chapter 110 of title 18, United States Code, is amended by inserting after section 2261 the following:

**"§ 2262. Severability.**

"If the provisions of any part of this Act or the amendments made by this Act, or the application thereof, to any person or circumstances is held invalid, the provisions of the other parts of this Act or the amendments made by this Act and their application to other persons or circumstances shall not be affected.".

I

100TH CONGRESS
2D SESSION

# S. 2033

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IN THE HOUSE OF REPRESENTATIVES

OCTOBER 19, 1988

Referred jointly to the Committees on the Judiciary, Ways and Means, and Energy and Commerce

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# AN ACT

To amend title 18, United States Code, with respect to child protection and obscenity enforcement, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## TITLE I—CHILD PORNOGRAPHY AND OBSCENITY

### SEC. 101. SHORT TITLE.

This title may be cited as the "Child Protection and Obscenity Enforcement Act of 1988".

# Subtitle A—Child Pornography

## SEC. 111. AMENDMENTS TO EXISTING OFFENSES.

(a) SEXUAL EXPLOITATION OF CHILDREN.—Paragraph (2) of subsection 2251(c) of title 18, United States Code, is amended by inserting "by any means including by computer" after "interstate or foreign commerce" both places it appears.

(b) MATERIAL INVOLVING SEXUAL EXPLOITATION OF CHILDREN.—Subsection 2252(a) of title 18, United States Code, is amended by inserting "by any means including by computer" after "interstate or foreign commerce" each place it appears.

(c) DEFINITION.—Section 2256 of title 18, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (4);

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof: "; and"; and

(3) by adding at the end the following:

"(6) 'computer' has the meaning given that term in section 1030 of this title.".

## SEC. 112. SELLING OR BUYING OF CHILDREN.

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by inserting after section 2251 the following:

**"§ 2251A. Selling or buying of children**

"(a) Any parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody of such minor either—

"(1) with knowledge that, as a consequence of the sale or transfer, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

"(2) with intent to promote either—

"(A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

"(B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct;

shall be punished by imprisonment for not less than 20 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

"(b) Whoever purchases or otherwise obtains custody or control of a minor, or offers to purchase or otherwise obtain custody or control of a minor either—

"(1) with knowledge that, as a consequence of the purchase or obtaining of custody, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

"(2) with intent to promote either—

"(A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

"(B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct;

shall be punished by imprisonment for not less than 20 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

"(c) The circumstances referred to in subsections (a) and (b) are that—

"(1) in the course of the conduct described in such subsections the minor or the actor traveled in or was transported in interstate or foreign commerce;

"(2) any offer described in such subsections was communicated or transported in interstate or foreign commerce by any means including by computer or mail; or

"(3) the conduct described in such subsections took place in any territory or possession of the United States.".

(b) DEFINITION.—Section 2256 of title 18, United States Code, as amended by section 201 of this Act, is further amended—

(1) by striking out "and" at the end of paragraph (5);

(2) by striking out the period at the end of paragraph (6) and inserting "; and" in lieu thereof; and

(3) by adding at the end the following:

"(7) 'custody or control' includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.".

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by inserting after the item relating to section 2251 the following:

"2251A. Selling or buying of children.".

**SEC. 113. RECORD KEEPING REQUIREMENTS.**

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by adding at the end thereof the following:

**"§ 2257. Record keeping requirements**

"(a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which—

"(1) contains one or more visual depictions made after February 6, 1978 of actual sexually explicit conduct; and

"(2) is produced in whole or in part with materials which have been shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

"(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct—

"(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

"(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

"(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

"(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

"(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in paragraphs (2) and (3), be used, directly or indirectly, as evidence against any person with respect to any violation of law.

"(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of any applicable provision of law with respect to the furnishing of false information.

"(3) In a prosecution of any person to whom subsection (a) applies for an offense in violation of subsection 2251(a) of this title which has as an element the production of a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct and in which that element is sought to be established by showing that a performer within the meaning of this section is a minor—

"(A) proof that the person failed to comply with the provisions of subsection (a) or (b) of this section concerning the creation and maintenance of records, or a regulation issued pursuant thereto, shall raise a rebuttable presumption that such performer was a minor; and

"(B) proof that the person failed to comply with the provisions of subsection (e) of this section concerning the statement required by that subsection shall raise the rebuttable presumption that every performer in the matter was a minor.

"(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.

"(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

"(3) In any prosecution of a person for an offense in violation of section 2252 of this title which has as an element the transporting, mailing, or distribution of a visual depiction involving the use of a minor engaging in sexually explicit conduct, and in which that element is sought to be established by a showing that a performer within the meaning of this section is a minor, proof that the matter in which the visual depiction is contained did not contain the statement required by this section shall raise a rebuttable presumption that such performer was a minor.

"(f) The Attorney General shall issue appropriate regulations to carry out this section.

"(g) As used in this section—

"(1) the term 'actual sexually explicit conduct' means actual but not simulated conduct as defined in subparagraphs (A) through (E) of paragraph (2) of section 2256 of this title;

"(2) 'identification document' has the meaning given that term in subsection 1028(d) of this title;

"(3) the term 'produces' means to produce, manufacture, or publish and includes the duplication, reproduction, or reissuing of any material; and

"(4) the term 'performer' includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by adding after the item relating to section 2256 the following:

**"2257. Record keeping requirements.".**

(c) EFFECTIVE DATE.—Section 2257 of title 18, United States Code, as added by this section shall take effect 180 days after the date of the enactment of this Act except—

(1) the Attorney General shall prepare the initial set of regulations required or authorized by section 2257 within 90 days of the date of the enactment of this Act; and

(2) subsection (e) of section 2257 of this title and of any regulation issued pursuant thereto shall take effect 270 days after the date of the enactment of this Act.

### SEC. 114. R.I.C.O. AMENDMENT.

Subsection 1961(1)(B) of title 18, United States Code, is amended by inserting after "section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity)" the following: "sections 2251 through 2252 (relating to sexual exploitation of children),".

## Subtitle B—Obscenity

### SEC. 121. RECEIPT OR POSSESSION FOR SALE; PRESUMPTIONS FOR CHAPTER 71.

(a) RECEIPT OR POSSESSION FOR SALE.—Chapter 71 of title 18, United States Code, is amended by inserting after section 1465 the following:

### "§ 1466. Receipt or possession of obscene matter for sale or distribution

"(a) Whoever is engaged in the business of selling or transferring books, magazines, pictures, papers, films, videotapes, or phonograph or other audio recordings, and knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

"(b) As used in this subsection, the term 'engaged in the business' means that the person who sells or transfers or offers to sell or transfer books, magazines, pictures, papers, films, videotapes, or phonograph or other audio recordings, devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is 'engaged in the business' as defined in subsection (b).

"(c) In a prosecution for a violation of this section, it shall be an affirmative defense, on which the defendant has the burden of persuasion by a preponderance of the evidence, that the person—

"(1) ordered or received the obscene matter without examining the matter in advance;

"(2) did not in fact offer the matter for sale, or transfer or offer to transfer it to another person other than the sender; and

"(3) possessed the material less than 21 days.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 71 of title 18, United States Code, is amended by adding after the item relating to section 1465 the following:

"1466. Receipt or possession of obscene matter for sale or distribution.
"1467. Criminal forfeiture.".

(c) USE OF FACILITY OF COMMERCE.—The first paragraph of section 1465 of title 18, United States Code, is amended by inserting after the word distribution: ", or knowingly travels in interstate commerce, or uses a facility or means of commerce for the purpose of interstate or foreign sale or distribution of,".

(d) DISTRIBUTION OF PROCEEDS.—Section 1465 of title 18, United States Code, is amended by inserting "or the proceeds from the sale thereof" after "character,".

(e) PRESUMPTIONS.—Chapter 71 of title 18, United States Code, as amended by subsection (a) of this section and by section 302, is further amended by adding at the end the following:

**"§ 1469. Presumptions**

"(a) In any prosecution under this chapter in which an element of the offense is that the matter in question was transported, shipped, or carried in interstate commerce, proof, by either circumstantial or direct evidence, that such matter was produced or manufactured in one State and is subsequently located in another State shall raise a rebuttable presumption that such matter was transported, shipped, or carried in interstate commerce.

"(b) In any prosecution under this chapter in which an element of the offense is that the matter in question was transported, shipped, or carried in foreign commerce, proof, by either circumstantial or direct evidence, that such matter was produced or manufactured outside of the United States and is subsequently located in the United States shall raise a rebuttable presumption that such matter was transported, shipped, or carried in foreign commerce.".

(f) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 71 of title 18, United States Code, is amended by adding after the item relating to section 1468 the following:

"1469. Presumptions.".

**SEC. 522. FORFEITURE IN OBSCENITY CASES.**

(a) IN GENERAL.—Chapter 71 of title 18, United States Code, is amended by adding at the end the following:

**"§ 1467. Criminal forfeiture**

"(a) PROPERTY SUBJECT TO CRIMINAL FORFEITURE.—A person who is convicted of an offense involving obscene material under this chapter shall forfeit to the United States such person's interest in—

"(1) any obscene material produced, transported, mailed, shipped or received in violation of this chapter;

"(2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

"(3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense. A forfeiture under this subparagraph shall be authorized only by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General or the Acting Assistant Attorney General in the Criminal Division.

"(b) THIRD PARTY TRANSFERS.—All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

"(c) PROTECTIVE ORDERS.—(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

"(A) upon the filing of an indictment or information charging a violation of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

"(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

"(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

"(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered;

except that an order entered under subparagraph (B) shall be effective for not more than 90 days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

"(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

"(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

"(d) WARRANT OF SEIZURE.—The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (c) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

"(e) ORDER OF FORFEITURE.—The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.

"(f) EXECUTION.—Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

"(g) DISPOSITION OF PROPERTY.—Following the seizure of property ordered forfeited under this section, the Attorney General shall destroy or retain for official use any property described in paragraph (1) of subsection (a) and shall direct the disposition of any property described in paragraph (2) of subsection (a) by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

"(h) AUTHORITY OF ATTORNEY GENERAL.—With respect to property ordered forfeited under this section, the Attorney General is authorized to—

"(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

"(2) comprise claims arising under this section;

"(3) award compensation to persons providing information resulting in a forfeiture under this section;

"(4) direct the disposition by the United States, in accordance with the provisions of section 1616, title 19, United States Code, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

"(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

"(i) APPLICABILITY OF CIVIL FORFEITURE PROVISIONS.—Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 1468(d) of this title (18 U.S.C. 1468(d)) shall apply to a criminal forfeiture under this section.

"(j) BAR ON INTERVENTION.—Except as provided in subsection (m) of this section, no party claiming an interest in property subject to forfeiture under this section may—

"(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

"(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

"(k) JURISDICTION TO ENTER ORDERS.—The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

"(l) DEPOSITIONS.—In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

"(m) THIRD PARTY INTERESTS.—(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

"(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within 30 days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

"(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

"(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within 30 days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

"(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

"(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

"(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

"(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

"(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

"(n) CONSTRUCTION.—The provisions of this section shall be liberally construed to effectuate its remedial purposes.

"(o) SUBSTITUTE ASSETS.—If any of the property described in subsection (a), as a result of any act or omission of the defendant—

"(1) cannot be located upon the exercise of due diligence;

"(2) has been transferred or sold to, or deposited with, a third party;

"(3) has been placed beyond the jurisdiction of the court;

"(4) has been substantially diminished in value; or

"(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).".

(b) REPEAL.—The last paragraph of section 1465 of title 18, United States Code, is repealed.

(c) SEXUAL ABUSE OF CHILDREN.—Sections 2253 through 2254 of title 18, United States Code, are amended to read as follows:

**"§ 2253. Criminal forfeiture**

"(a) PROPERTY SUBJECT TO CRIMINAL FORFEITURE.—A person who is convicted of an offense under this chapter involving a visual depiction described in sections 2251, 2251A, or 2252 of this chapter shall forfeit to the United States such person's interest in—

"(1) any visual depiction described in sections 2251, 2251A, or 2252 of this chapter, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter;

"(2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

"(3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense.

"(b) THIRD PARTY TRANSFERS.—All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

"(c) PROTECTIVE ORDERS.—(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

"(A) upon the filing of an indictment or information charging a violation of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

"(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered;

except that an order entered pursuant to subparagraph (B) shall be effective for not more than 90 days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

"(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which is it entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

"(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

"(d) WARRANT OF SEIZURE.—The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (c) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

"(e) ORDER OF FORFEITURE.—The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.

"(f) EXECUTION.—Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

"(g) DISPOSITION OF PROPERTY.—Following the seizure of property ordered forfeited under this section, the Attorney General shall destroy or retain for official use any article described in paragraph (1) of subsection (a), and shall retain for official use or direct the disposition of any property described in paragraph (2) or (3) of subsection (a) by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

"(h) AUTHORITY OF ATTORNEY GENERAL.—With respect to property ordered forfeited under this section, the Attorney General is authorized to—

"(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

"(2) compromise claims arising under this section;

"(3) award compensation to persons providing information resulting in a forfeiture under this section;

"(4) direct the disposition by the United States, in accordance with the provisions of section 1616, title 19, United States Code, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

"(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

"(i) APPLICABILITY OF CIVIL FORFEITURE PROVISIONS.—Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 2254(d) of this title (18 U.S.C. 2254(d)) shall apply to a criminal forfeiture under this section.

"(j) BAR ON INTERVENTION.—Except as provided in subsection (m) of this section, no party claiming an interest in property subject to forfeiture under this section may—

"(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

"(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

"(k) JURISDICTION TO ENTER ORDERS.—The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

"(l) DEPOSITIONS.—In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under rule 15 of the Federal Ruled of Criminal Procedure.

"(m) THIRD PARTY INTERESTS.—(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those person so notified.

"(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within 30 days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

"(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

"(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within 30 days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

"(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

"(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

"(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

"(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

"(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

"(n) CONSTRUCTION.—The provisions of this section shall be liberally construed to effectuate its remedial purposes.

"(o) SUBSTITUTE ASSETS.—If any of the property described in subsection (a), as a result of any act or omission of the defendant—

"(1) cannot be located upon the exercise of due diligence;

"(2) has been transferred or sold to, or deposited with, a third party;

"(3) has been placed beyond the jurisdiction of the court;

"(4) has been substantially diminished in value; or

"(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

**"§ 2254. Civil forfeiture**

"(a) PROPERTY SUBJECT TO CIVIL FORFEITURE.—The following property shall be subject to forfeiture by the United States:

"(1) Any visual depiction described in sections 2251, 2251A, or 2252 of this chapter, or any book, magazine, periodical, film, videotape or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped, or received in violation of this chapter.

"(2) Any property, real or personal, used or intended to be used to commit or to promote the commission of an offense under this chapter involving a visual depiction described in section 2251, 2251A, or 2252 of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

"(3) Any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from a violation of this chapter involving a visual depiction described in section 2251, 2251A, or 2252 of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

"(b) SEIZURE PURSUANT TO SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS.—Any property subject to forfeiture to the United States under this section may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when the seizure is pursuant to a search under a search warrant. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

"(c) CUSTODY OF ATTORNEY GENERAL.—Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

"(1) place the property under seal;

"(2) remove the property to a place designated by him; or

"(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

"(d) OTHER LAWS AND PROCEEDINGS APPLICABLE.—All provisions of the customs laws relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General or the Postal Service, except to the extent that such duties arise from seizures and forfeitures affected by any customs officer.

"(e) Sections 1613, 1614, 1617, and 1618 of title 19, United States Code, shall not apply with respect to any visual depiction or any matter containing a visual depiction subject to forfeiture under subsection (a)(1) of this section.

"(f) DISPOSITION OF FORFEITED PROPERTY.—Whenever property is forfeited under this section the Attorney General shall destroy or retain for official use any property described in paragraph (1) of subsection (a) and, with respect to property described in paragraph (2) or (3) of subsection (a), may—

"(1) retain the property for official use or transfer the custody or ownership of any forfeited property to a Federal, State, or local agency pursuant to section 1616 of title 19;

"(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public; or

"(3) require that the General Services Administration take custody of the property and dispose of it in accordance with law.

The Attorney General shall ensure the equitable transfer pursuant to paragraph (1) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General pursuant to paragraph (1) shall not be subject to judicial review. The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28 the proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter.

"(g) TITLE TO PROPERTY.—All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

"(h) STAY OF PROCEEDINGS.—The filing of an indictment or information alleging a violation of this chapter which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

"(i) VENUE.—In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.".

(e) TARIFF ACT AMENDMENT.—Section 305 of the Tariff Act of 1930 (19 U.S.C. 1305), is amended by adding at the end the following:

"(b) COORDINATION OF FORFEITURE PROCEEDINGS WITH CRIMINAL PROCEEDINGS.—(1) Notwithstanding subsection (a), whenever the Customs Service is of the opinion that criminal prosecution would be appropriate or that further criminal investigation is warranted in connection with allegedly obscene material seized at the time of entry, the appropriate customs officer shall immediately transmit information concerning such seizure to the United States Attorney of the district of the addressee's residence. No notice to the addressee or consignee concerning the seizure is required at the time of such transmittal.

"(2) Upon receipt of such information, such United States attorney shall promptly determine whether in such attorney's opinion the referral of the matter for forfeiture under this section would materially affect the Government's ability to conduct a criminal investigation with respect to such seizure.

"(3) If the United States attorney is of the opinion that no prejudice to such investigation will result from such referral, such attorney shall immediately so notify the Customs Service in writing. The appropriate customs officer shall immediately notify in writing the addressee or consignee of the seizure and shall transmit information concerning such seizure to the United States attorney of the district in which is situated the office at which such seizure has taken place. The actions described in paragraphs (1) through (3) of this subsection shall take place within sufficient time to allow for the filing of a forfeiture complaint within 14 days of the seizure unless the United States attorney of the district of the addressee's residence certifies in writing and includes specific, articulable facts demonstrating that the determination required in paragraph (2) of this subsection could not be made in sufficient time to comply with this deadline. In such cases, the actions described in paragraphs (1) through (3) of this subsection shall take place within sufficient time to allow for the filing of a forfeiture complaint within 21 days of seizure.

"(4) If the United States attorney for the district of the addressee's residence concludes that material prejudice to such investigation will result from such referral, such United States attorney shall place on file, within 14 days of the date of seizure, a dated certification stating that it is the United States attorney's judgment that referral of the matter for forfeiture under this section would materially affect the Government's ability to conduct a criminal investigation with respect to the seizure. The certification shall set forth specific, articulable facts demonstrating that withholding referral for forfeiture is necessary.

"(5)(A) As soon as the circumstances change so that withholding of referral for forfeiture is no longer necessary for purposes of the criminal investigation, the United States attorney shall immediately so notify the Customs Service in writing and shall furnish a copy of the certification described in paragraph (4) above to the Customs Service.

"(B) In any matter referred to a United States attorney for possible criminal prosecution wherein subparagraph (5)(A) does not apply, the United States attorney shall immediately notify the Customs Service in writing concerning the disposition of the matter, whether by institution of a prosecution or a letter of declination, and shall also furnish a copy of the certification described in paragraph (4) of this subsection to the Customs Service.

"(C) Upon receipt of the notification described in subparagraph (A) or (B) of this paragraph, the appropriate customs officer shall immediately notify the addressee or consignee of the seizure and shall transmit information concerning the seizure, including a copy of the certification described in paragraph (4) above and a copy of the notification described in subparagraph (A) or (B) of this paragraph, to the United States attorney of the district in which is situated the office at which such seizure has taken place, who shall institute forfeiture proceedings in accordance with subsection (a) hereof within 14 days of the date of the notification described in subparagraph (A) or (B) above. A copy of the certification described in paragraph (4) above and a copy of the notification described in subparagraph (A) or (B) of this paragraph shall be affixed to the complaint for forfeiture.

"(c) STAY ON MOTION.—Upon motion of the United States, a court, for good cause shown, shall stay civil forfeiture proceedings commenced under this section pending the completion of any related criminal matter whether in the same or in a different district.".

### SEC. 123. CABLE TELEVISION OBSCENITY.

(a) NEW OFFENSE.—Chapter 71 of title 18, United States Code, is amended by inserting at the end, the following new section:

**"§ 1468. Distributing obscene material by cable or subscription television**

"(a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.

"(b) As used in this section, the term 'distribute' means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

"(c) Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television or subscription services on television.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 71 of title 18, United States Code, is amended by adding at the end the following:

"1468. Distributing obscene material by cable or subscription television.".

**SEC. 124. COMMUNICATIONS ACT AMENDMENT.**

Section 223(b) of the Communications Act of 1934 (47 U.S.C. 223(b)) is amended to read as follows;

"(b)(1)(A) Whoever knowingly—

"(i) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(ii) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i);

shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.

"(2)(A) Whoever knowingly—

"(i) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(ii) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

shall be fined not more than $50,000 or imprisoned not more than six months, or both.".

**SEC. 125. ELECTRONIC SURVEILLANCE.**

Subsection (1) of section 2516 of title 18, United States Code, is amended by redesignating paragraphs (i) and (j) as (j) and (k), respectively, and by adding a new paragraph (i) as follows:

"(i) any felony violation of chapter 71 (relating to obscenity) of this title;".

**SEC. 126. POSSESSION AND SALE OF OBSCENE MATTERS IN FEDERAL JURISDICTION OR ON FEDERAL PROPERTY.**

(a) IN GENERAL.—Chapter 71 of title 18, United States Code, is amended by inserting before section 1461 the following:

**"§ 1460. Possession and sale of obscene matter on Federal property**

"(a) Whoever, either—

"(1) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States; or

"(2) in the Indian country as defined in section 1151 of this title,

knowingly sells or possesses with intent to sell an obscene visual depiction or a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct, shall be punished by a fine in accordance with the provisions of this title or imprisoned for not more than 2 years, or both.

"(b) Except as provided in subsection (c), whoever, in an area described in subparagraph (1) or (2) of subsection (a) knowingly possesses an obscene visual depiction or a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct shall be punished by imprisonment for not more than 6 months or a fine of not more than $5,000 for an individual or $10,000 for a person other than an individual, or both.

"(c) Subsection (b) shall not apply in the case of a person who possesses an obscene visual depiction in any place where such person lives or resides.

"(d) For the purposes of this section—

"(1) the term 'visual depiction' includes undeveloped film and videotape but does not include mere words; and

"(2) the terms 'minor' and 'sexually explicit conduct' have the meaning given those terms in chapter 110 of this title.

"(e) In a prosecution for a violation of this section involving an obscene visual depiction, it shall be an affirmative defense, on which the defendant has the burden of persuasion by a preponderance of the evidence, that the person—

"(1) ordered or received the obscene matter without examining the matter in advance;

"(2) did not in fact offer the matter for sale, or transfer or offer to transfer it to another person other than the sender; and

"(3) possessed the material less than 21 days.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 71 of title 18, United States Code, is amended by adding before the item relating to section 1461 the following:

"1460. Possession and sale of obscene matter on Federal property.".

**SEC. 127. CIVIL FORFEITURE.**

(a) IN GENERAL.—Chapter 71 of title 18, United States Code, is amended by adding the following new section at the end thereof:

**"§ 1470. Civil forfeiture**

"(a) PROPERTY SUBJECT TO CIVIL FORFEITURE.—The following property shall be subject to forfeiture by the United States:

"(1) Any material that has been adjudged obscene in any criminal case, Federal or State, that is produced, transported, mailed, shipped, or received in violation of this chapter.

"(2) Any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from a violation of this chapter involving material that has been adjudged obscene in any criminal case, State or Federal, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

"(b) SEIZURE PURSUANT TO SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS.—Any property subject to forfeiture to the United States under this section may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when the seizure is pursuant to a search under a search warrant. The government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

"(c) CUSTODY OF ATTORNEY GENERAL.—Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

"(1) place the property under seal;

"(2) remove the property to a place designated by him; or

"(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

"(d) OTHER LAWS AND PROCEEDINGS APPLICABLE.—All provisions of the customs laws relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General or the Postal Service, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

"(e) APPLICABILITY OF CERTAIN SECTIONS.—Sections 1606, 1607, 1608, 1609, 1613, 1614, 1617, and 1618 of title 19 shall not apply with respect to obscene material subject to forfeiture under subsection (a)(1) of this section.

"(f) DISPOSITION OF FORFEITED PROPERTY.—Whenever property is forfeited under this section the Attorney General shall destroy or retain for official use any article described in paragraph (1) of subsection (a), and with respect to property described in paragraphs (2) and (3) of subsection (a) may—

"(1) retain the property for official use or transfer the custody or ownership of any forfeited property to a Federal, State, or local agency pursuant to section 1616 of title 19;

"(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public; or

"(3) require that the General Services Administration take custody of the property and dispose of it in accordance with law.

The Attorney General shall ensure the equitable transfer pursuant to paragraph (1) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General pursuant to paragraph (1) shall not be subject to judicial review. The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28 the proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter.

"(g) TITLE TO PROPERTY.—All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

"(h) STAY OF PROCEEDINGS.—The filing of an indictment or information alleging a violation of this chapter which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

"(i) VENUE.—In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.".

(b) CLERICAL AMENDMENTS.—The table of sections at the beginning of chapter 71 of title 18, United States Code, is amended by inserting after the item relating to section 1469 the following:

"1470. Civil forfeiture.".

(c) REPEAL.—The last paragraph of section 1465 of title 18, United States Code, is repealed.

**SEC. 128. CIVIL FINES.**

Chapter 71 of title 18, United States Code, is amended by inserting at the end the following new section:

"Section 1471. Civil fines.

"(a) Whoever produces, transports, mails, ships or receives any article that has been adjudged obscene in any state or federal criminal case shall be subject to a civil penalty of—

"(1) for a first violation, not more than $10,000;

"(2) for a second violation, not more than $50,000; and

"(3) for a third or subsequent violation, not more than $250,000 in the case of an individual, or $500,000 in the case of an organization.

"(b) An action to recover a fine imposable under subsection (a) shall be brought in the name of the United States. The Attorney General may commence such a civil action in the district court in any district where the violation occurs. Such an action must be commenced within 5 years of the violation. The Attorney General may compromise, modify, or remit with or without condition any civil penalty imposed under this section.

"(c) In any civil action under this section, the defendant shall have a right to a trial by jury, and the government shall have the burden of proof, by a preponderance of the evidence, that the article is obscene under the standards of the community in which the trial takes place."

### SEC. 129. SEVERABILITY.

If any of the provisions of this Act are found invalid, such finding shall not affect the validity or effect of the remaining provisions thereof.

Passed the Senate October 14 (legislative day, October 12), 1988.

Attest: WALTER J. STEWART,
*Secretary.*